TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~1307~~ 605 301

PETER BUTLER, RECEIVER OF THE PACIFIC NATIONAL BANK OF BOSTON, PLAINTIFF IN ERROR,

vs.

MARY J. EATON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED NOVEMBER 23, 1887.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Peter Butler, of Boston, in the district of Massachusetts, receiver of the Pacific National Bank of Boston, plaintiff, and Mary J. Eaton, of said Boston, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the seventh day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
THOS. L. NELSON,
Dist. Judge.

2 CIRCUIT COURT OF THE UNITED STATES, *District of Massachusetts,* } *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this seventh day of October, A. D. 1887.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss.:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Monday, the sixteenth day of May, in the year of our Lord one thousand eight hundred and eighty-seven, the fifteenth day of said May happening on a Sunday.

Before the Honorable Le Baron B. Colt, circuit judge.

PETER BUTLER, of Boston, in the State of Massachusetts, Receiver of the Pacific National Bank of Boston, Plaintiff,

v.

MARY J. EATON, of said Boston, Defendant.

In an action of contract.

The following declaration was filed with plaintiff's writ:

4 *Plaintiff's Declaration. (Filed with Plaintiff's Writ.)*

Circuit Court of the United States, District of Massashusetts.

LINUS M. PRICE, Receiver, *vs.* MARY J. EATON.

Plaintiff says that the Pacific National Bank of Boston heretofore and prior to the acts herein mentioned was duly organizad and authorized to do business as a national bank or banking association under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds and to provide for the circulation and redemption thereof," approved on the 3d day of June, A. D. 1864, and which said provisions are embraced in title sixty-two of the Revised Statutes of the United States, located and having its banking-house at Boston, in State of Massachusetts; that said banking association thereupon proceeded and for a long time thereafter continued to issue currency and receive deposits of money, discount negotiable paper, and generally to transact the business of a national banking association, as authorized by the aforesaid act of Congress; that in its said business as aforesaid the said banking association contracted, prior to the 22d day of May, A. D. 1882, large debts and liabilities, and that, to wit, on the 22d day of May, A. D. 1882, the Comptroller of the Currency of the United States was satisfied from a report of proceedings of the board of directors of the Pacific National Bank of Boston previously made to said Comptroller that said banking association, the Pacific National Bank of Boston aforesaid, was insolvent and unable to pay its debts and liabilities; that the said Comptroller of the Currency, upon being satisfied of the insolvency of said banking association as aforesaid, did, to wit, on the 22d day of May, A. D. 1882, and as authorized and empowered to do by virtue of section one of an act of Congress entitled "An act authorizing the appointment of receivers

of national banks, and for other purposes," approved on the 30th day of June, A. D. 1876, duly appoint the said Linus M. Price receiver of all the property, books, records, and assets of the said banking association, as is provided by law, and the said Linus M. Price accepted said appointment and duly qualified as such receiver aforesaid and executed such bond and with such surety as required by the laws of the United States and approved by said Comptroller, and which said appointment more fully appears by a copy thereof, hereto annexed, marked "Schedule A," or to the original of which, ready to be produced in court, the said plaintiff craves leave to refer; that thereupon the said plaintiff, under the direction of the said Comptroller, took possession of the books, records, property, and assets of every description of the Pacific National Bank of Boston aforesaid, and has ever since been and is now engaged in collecting and converting the assets thereof and discharging in other respects the lawful duties of his said receivership.

And the plaintiff avers that the property and assets of said banking association are insufficient to pay and satisfy its debts and liabilities contracted as aforesaid, and that in order to provide for the paying of the same it became and was and is now necessary to enforce the personal liabilities of the stockholders, as is provided and imposed by said act of Congress.

And the said plaintiff further avers that the said Comptroller of the Currency did ascertain and determine upon data satisfactory to him that the assets and credits of said association were insufficient to pay its said debts and liabilities, and that in order to provide the money necessary to pay said debts and liabilities of said association it was necessary to enforce the individual liability of the shareholders of said association, as provided by the aforesaid act of Congress, and especially by the twelfth section thereof (Section 5151, U. S. Rev. Statutes), and that said Comptroller, in pursuance of the powers for that purpose vested in him by the aforesaid act of Congress and to that end, did, to wit, on the 27th day of November, A. D. 1882, order and make an assessment upon the said shareholders of said association, including the said defendant in this action, and each and every one of them equally and ratably to the amount of one hundred *dollars* per centum (100 per cent.) of the par value of the shares of the capital stock in the said association held or owned by them, respectively, including the defendant, at the time of its insolvency, failure, or suspension as aforesaid, which said assessment more fully appears by a copy of the order making the same, hereto annexed, marked "Schedule B," or to the original thereof, ready in court to be produced, and to which the said plaintiff craves leave to refer.

And the said plaintiff further avers that the said Comptroller has decided that it is now necessary to institute a suit or suits against the said shareholders, including the defendant, to enforce their said personal liability, and to that end has ordered and directed the said plaintiff to institute in the proper court or courts such suit or suits as may be necessary to enforce against each and every shareholder of the said association equally and ratably his or her personal liability as such shareholder in manner and to the extent provided by

the twelfth section of said act (section 5151, U. S. Rev. Statutes)—that is to say, the rate of one hundred per cent. hereinbefore specified.

And the said plaintiff further avers that the said defendant was at the time of said insolvency, failure, or suspension of said banking association a shareholder of its capital stock to the amount of eighty shares, of the par value of one hundred dollars per share, and of the aggregate value at par of eight thousand dollars, and held or was entitled to hold in her possession or control the usual stock certificates as such shareholder in said banking association, and that, to wit, on the first day of December, A. D. 1882, the said plaintiff made demand in writing upon the said defendant as such shareholder for payment of the sum of eight thousand dollars, the amount of said assessment so made as aforesaid under and by virtue of the order of the Comptroller of the Currency, hereto annexed and marked "Schedule B," as aforesaid.

And the said plaintiff avers that by reason of the premises the said defendant has become and now is indebted and liable to pay to the plaintiff as such receiver one hundred per cent. of the amount of said capital stock—that is, one hundred dollars upon each and every share so held and owned by the said defendant at the time of the declared insolvency, failure, and suspension of said banking association as aforesaid, and which said liability or indebtedness of the defendant amounts in the whole to the sum of eight thousand dollars; which said sum of money so due, owing, and payable to the said plaintiff as receiver aforesaid, though often requested, the said defendant has not paid the same or any part thereof, but has wholly neglected and refused and still does neglect and refuse so to do.

The defendant owes the plaintiff the said sum, with interest thereon, which is demanded.

RANNEY & CLARK, *Attorneys.*

SCHEDULE A, referred to in foregoing declaration.

WASHINGTON, *May* 22, 1882.

Whereas it appears from the report of proceedings of the board of directors of the Pacific National Bank of Boston, located in the city of Boston, county of Suffolk, and State of Massachusetts, at a meeting held on May 20, 1882, that the said bank is insolvent, and being satisfied that the said bank is insolvent and unable to pay its just and legal debts:

Now, therefore, I, John Jay Knox, Comptroller of the Currency, in pursuance of the power and authority vested in me by law and under the provisions of sect. 1 of an act of Congress entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved June 30, 1876, do hereby appoint Linus M. Price receiver of the Pacific National Bank of Boston, with all the powers, duties, and responsibilities given to or imposed upon a receiver under provisions of the Revised Statutes of the United States which authorize the appointment of a receiver.

In witness whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-second day of May, A. D. 1882.

[L. S.] (Signed) JOHN JAY KNOX,
Comptroller of the Currency.

SCHEDULE B, referred to in foregoing declaration.

In the Matter of "THE PACIFIC NATIONAL BANK OF BOSTON," MASSACHUSETTS.

To all whom it may concern:

This is to certify that I have taken an accounting of the condition of the estate of the Pacific National Bank of Boston, Massachusetts, aforesaid, and of its assets and liabilities, and I do find and determine, upon data satisfactory to me, that in order to provide the money necessary to pay the debts of said association it is necessary now to enforce to the extent hereinafter mentioned the individual liability of the shareholders of said association provided for by the twelfth section of the act of Congress entitled "An act to provide a national currency," approved June 3, 1864, and by sect. 5151 of the Revised Statutes of the United States, approved June 22, 1874, and to that end and in pursuance of the powers vested in me by the said acts I have made, and hereby order and make, an assessment or requisition upon the shareholders of said association or bank and each and every one of them equally and ratably to the amount of one hundred per centum of the par value of the shares of the capital stock in the said association held or owned by them, respectively, at the time of its failure or suspension, and I direct Linus M. Price, receiver heretofore appointed of the said association, to take the necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-seventh day of November, A. D. 1882.

[L. S.] (Signed) JOHN JAY KNOX,
Comptroller of the Currency.

6 The writ in this cause is dated the fourteenth day of March, A. D. 1883, and was duly entered at the May term of this court, A. D. 1883, when and where the parties appeared, by their respective attorneys.

On the second day of June, A. D. 1883, the following answer and declaration in set-off was filed:

Answer and Declaration in Set-Off. (*Filed June* 2, 1883.)

Answer.

The defendant denies each and every allegation in the plaintiff's writ and declaration contained.

By her attorney, J. H. BENTON, JR.

Declaration in set-off.

The defendant says that the Pacific National Bank, of which the plaintiff says he is receiver, was and the plaintiff as receiver is indebted to her in the sum of four thousand dollars and interest thereon from the twenty-eighth day of September, 1881, for money had and received by said bank to her use at that time.

And in the second count, for the same cause of set-off, the defendant says that on the twenty-eighth day of September,
7 1881, she paid to said Pacific National Bank four thousand dollars, which it then agreed to apply in payment for forty shares, of the par value of one hundred dollars each, of capital stock in said bank in an increase of the stock of said bank of the amount of five hundred thousand dollars, which increase of five hundred thousand dollars it then agreed to make and to issue to her within a reasonable time after the said twenty-eighth day of September forty shares of said increase of the capital, of the par value of one hundred dollars each; and the defendant says that said bank did not within a reasonable time thereafter issue to her forty shares of said stock, of the par value of one hundred dollars each, in an increase of five hundred thousand dollars of said capital stock, but wholly failed to increase its capital stock five hundred thousand dollars and to issue to her forty shares of said increase.

And she says that she has demanded said money of said bank and of the plaintiff, but that neither the bank nor the plaintiff have paid the same to her, but have wholly refused and neglected so to do.

And the defendant says that she is willing to set off and
8 apply so much of said four thousand dollars and interest as may be necessary to pay any sum which may be found due from her to the plaintiff upon the causes of action set forth in the plaintiff's declaration.

By her attorney, J. H. BENTON, JR.

This cause was thence continued from term to term to the October term, A. D. 1885, when the following motion was filed:

Motion of Peter Butler, Receiver. Filed May 10, 1886.

Peter Butler, of Boston, in the district of Massachusetts, represents that he has been duly appointed and qualified as receiver of the

Pacific National Bank in place of Linus M. Price removed. He therefore asks to be admitted as a party plaintiff in said action, and for leave to prosecute the same in substitution for said Price.

By his attorneys, RANNEY & CLARK.

Which motion was allowed by the court.

9 This cause was thence continued from term to term to this present term, when the following offer of judgment is filed:

Offer of Judgment. Filed May 20, 1887.

And now comes the defendant and offers in court and consents in writing to be defaulted and that judgment shall be rendered against her as damages for the sum of five thousand and eighty dollars and costs to be taxed.

By J. H. BENTON, Jr., *Attorney.*

On the thirty-first day of May, A. D. 1887, the following answer is filed:

Answer Since the Last Continuance. Filed May 31, 1887.

And now comes the defendant and says that on the thirteenth of September, 1881, the capital stock of the Pacific National Bank, of which the plaintiff is receiver, was five hundred thousand dollars, divided into five thousand shares of one hundred dollars each, of which she owned forty shares, which stood in her name on its books; that on that day the directors of the bank voted that its capital be increased to one million dollars by the issue of
10 five thousand new shares at par, and notified her of the proposed increase and that she was entitled to take forty shares of stock in said proposed issue of five thousand shares at par within a reasonable time, and that subscriptions to stock in such proposed increase were payable October first, and that if she anticipated payment she would be allowed interest to that date at four per cent. No subscription books were opened for subscriptions to stock in said proposed increase, and this defendant did not subscribe for any stock in such increase, but on the twenty-eighth day of September, 1881, she paid to the bank $4,000 on account of subscription to new stock, for which it then agreed to make and issue to her within a reasonable time thereafter forty shares in said proposed increase of five thousand shares of its capital, of the par value of one hundred dollars each; and she says that said bank did not within a reasonable time thereafter make and issue to her forty shares of stock in said proposed increase, of the par value of one hundred dollars each, but wholly failed to increase its capital stock, as proposed, in the sum of five hundred thousand dollars, divided into five thousand shares of the par value of one hundred dollars each; and that it has
11 never made and issued to her forty shares of stock in such proposed increase, nor any shares of stock in any valid in-

crease of its capital; and she further says that on the tenth day of January, 1882, she demanded of the bank repayment of said four thousand dollars on the ground that the conditions upon which the bank had received it had not been performed, but that the bank did not repay said money; and she further says that on the eighteenth day of November, 1881, said bank failed, closed its doors to business; and was placed in the possession and control of a national bank examiner by the Comptroller of the Currency, and that while said bank was in the control of said examiner, without her knowledge or consent and without any lawful authority therefor, its officers assumed to register her name upon its books as the owner of forty shares in a claimed increase of its capital stock in the sum of $461,300, divided into 4,613 shares, of the par value of one hundred dollars each; and she says that said forty shares thus illegally registered in her name in such claimed increase are forty of the shares which in the plaintiff's declaration it is alleged she owned at the time of the alleged assessment upon her stock in said bank, set forth in the plain-
12 tiff's declaration, and that said alleged assessment was assumed to be made as well upon said forty shares thus illegally registered to her as upon the forty shares which she owned in said bank on the thirteenth day of September, 1881.

And the defendant further says that on the fourteenth day of March, 1883, she brought a suit in the superior court for Suffolk county, Massachusetts, to recover the four thousand dollars paid by her to the bank as above set forth on the twenty-eighth of September, 1881, upon the ground that the conditions upon which it was paid to the bank by her had not been performed, and that the forty shares of stock in said claimed increase of 4,613 shares were not shares of stock in the increase for shares in which she paid her four thousand dollars, and that she was not the holder or owner of the said forty shares thus improperly registered in her name by the defendant bank. Said bank appeared to defend said suit, and by proper proceedings removed the same to the supreme judicial court for said county of Suffolk. Subsequently this plaintiff, as receiver, appeared to defend said suit, and thereafterwards, on the tenth day of May, 1887, since the last continuance of this action, she, as plaintiff, recovered final judgment against said receiver for said sum of four thousand dollars and interest thereon from the tenth day of
13 January, 1882, when repayment of the same was demanded of the bank, to the twenty-second day of May, 1882, when said bank passed into the hands of the plaintiff receiver for liquidation.

Wherefore she says the plaintiff ought not to further have and maintain this action against her to recover the assessment alleged to have been made upon said alleged forty shares of stock thus improperly registered to her upon the books of the bank, as hereinabove set forth.

J. H. BENTON, JR.,
For Defendant.

On the said thirty-first day of May the following agreement is filed:

Agreement Waiving Jury Trial. Filed May 31, 1887.

It is mutually agreed that a jury trial is waived in each of said cases (this case and same plaintiff herein *v.* George L. Thayer), and the cases are to be submitted to the court.

RANNEY & CLARK,
For Plaintiff.
J. H. BENTON, JR.,
For Defendant.

On the twenty-fifth day of July, A. D. 1887, the following agreed statement of facts is filed:

14 *Agreed Statement of Facts.* (*Filed July* 25, 1887.)

The Pacific National Bank of Boston, Massachusetts, a national banking association created under the national banking acts of Congress, being insolvent on May 22, 1882, the Comptroller of the Currency, by action appearing in his order or certificate annexed to declaration, marked Schedule A, appointed Linus M. Price receiver, and the bank then passed into his hands to be wound up. On November 27, 1882, for the purpose of enforcing the alleged individual liability of the stockholders, the said Comptroller made the order of assessment appearing in Schedule B, annexed to the declaration, and defendant not paying on notice and demand this suit was brought. Peter Butler was appointed receiver on March 18, 1886, in place of said Price, removed. A copy of articles five and six of its articles of association, being all thereof that are material to this suit, is as follows:

"Fifth. The capital stock of this association shall be two hundred and fifty thousand dollars, to be divided into shares of one hundred dollars each, but the capital may be increased, according to the provisions of section 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars; and in the case of the increase of capital of the association each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

"Sixth. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold this office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director, and they shall have power to elect a vice-president, who shall also be a member of the board of directors, and to elect or appoint a cashier and other such officers and clerks as may be required to transact the business of the association, to fix the salaries
15 to be paid to them, and continue them in office or dismiss them, as, in the opinion of a majority of the board, the in-

terests of the association may demand. They shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held and to appoint judges of the elections; to provide for an increase of the capital of the association and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make under said Revised Statutes for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal, debtor, or otherwise, without the consent of the board."

Section eleven of the by-laws of the bank, being all therein which is material to this suit, is as follows:

"Whenever an increase of stock shall be determined upon it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the bank. If any stockholder shall fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

On the 13th of September, 1881, the capital stock of the defendant, as previously increased, was $500,000, divided into 5,000 shares of the par value of $100 each, of which shares defendant owned forty, which stood in her name on the books of the bank. The following is a copy of the certificate held and continued to be held by the defendant:

"No. 170. 40 shares.

The Pacific National Bank of Boston, Massachusetts.

This certifies that Mary J. Eaton is proprietor of forty
16 shares in the capital stock of the Pacific National Bank of Boston, Mass. Transferable only on the books of the said bank, in person or by attorney, on surrender of this certificate.

Boston, January 16th, 1878.

A. I. BENYON, *President.*
F. J. CHICK, *Cashier.*"

There is no dispute as to the ownership and liability of the defendant in this suit in respect to the stock represented by this certificate, and the same is conceded.

September 13, 1881, the directors of the bank passed the following vote:

"Voted, That the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in an amount equal to that now held by them."

The following notice was thereupon sent to all the stockholders of the bank:

"A. I. Benyon, president. J. M. Pettengill, cashier.

"Pacific National Bank, 105 Devonshire street.

"BOSTON, *Sept.* 13, 1881.

"At a meeting of the directors of this bank held this day it was—

"Voted, That the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.

"Subscription to the new stock payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

"J. M. PETTENGILL, *Cashier.*"

At the bottom of this printed notice was left a space and lines indicated for stockholders to write therein their subscriptions to the new stock to which they were entitled. Other than this there was no subscription paper opened. Some stockholders signified their assent on the notice in the place indicated at the bottom and sent it to the bank. Others, including defendant, did not, but went or sent to the bank and paid the money for the new stock to which they would be entitled in the proposed increase, taking receipts in the printed form prepared for that purpose.

Miss Eaton wrote upon her notice and gave it to George L. Thayer, her agent, in the following form (the original being annexed as Exhibit 1). Mr. Thayer, September 28th, went to the bank, and, from money in his hands as agent of Miss Eaton, without further direction from her, paid $4,000 and took the following receipt. He retained the paper on which Miss Eaton had written in his possession, not delivering it to the bank:

17 *Copy of Receipt.*

"Pacific National Bank.

"$4,000. *Sep.* 28.

"BOSTON, *October* 1*st*, 1881.

"Received of Mary J. Eaton four thousand dollars on account of subscription to new stock.

"J. M. PETTENGILL, *Cashier.*"

He also, at the same time holding forty shares of the old stock standing in his name as trustee in the certificate held and on the books of the bank, paid the same amount and took a similar receipt,

without having subscribed in writing. Payments on account of the stock in the said proposed increase, each party paying the par value of the shares to which he was entitled, to the amount of $330,100 were made on and prior to October 1, 1881, at which time, in making the sworn official return to the Comptroller of the Currency of the condition of the bank on that date, the bank officials reported the amount of its capital paid in at $830,100. Additional payments were made on account of stock in the said proposed increase, each paying the par value, until the fifteenth day of November, 1881. On the 18th day of November, 1881, the bank became unable to pay its debts and liabilities, suspended payment thereof, failed to redeem its circulating notes, and thereupon closed its doors to business. The following is a copy of vote of that date to suspend: "Voted, To temporarily suspend." A schedule showing the dates and amounts of the respective payments in the aggregate each day on account of stock in the said proposed increase is hereto annexed, marked "Exhibit A." The whole amount thus paid in was $461,370.

The money thus paid in up to October 1 was deposited in a separate account in the bank to the credit of its cashier, as trustee, and the $330,100, which thus stood to his credit, as trustee, October 1, was then carried to the account of "new capital stock" on the books of the bank, to which account all sums subsequently paid on account of stock in the proposed increase were credited, and all the money thus paid in was used in the general business of the bank. No payments were made to the bank on account of the said proposed increase of $500,000 except those to the amount of $461,370, made as hereinbefore stated. No notice was transmitted to the Comptroller of the Currency of the payment of such proposed increase or of any increase except as herein stated, and the Comptroller did not certify his approval of such increase or of any increase or of the payment thereof except as herein stated.

The president and cashier of the bank began to issue certificates for stock in the proposed increase on October 1, 1881, and thereafter issued them from time to time, as called for, to those who had paid, and on November 18, 1881, certificates, dated Oct. 1, 1881, representing all but three hundred and fifty-four shares of the $461,370, had been thus delivered and the shares credited to the accounts of the respective parties on or as of October 1, 1881, on the stock ledger of the bank. There was no vote of the directors on the subject of issuing the certificates, but it was done with their knowledge, and they were among the number of stockholders who took them. The books of the bank also show that three hundred and fifty shares represented by certificates thus issued in the proposed increase had been transferred to third parties, the original certificates surrendered to the bank, and new ones issued therefor prior to November 18, 1881.

A certificate and stub, of which the following is a copy, was
18 made out ready for delivery, but still remains in the certificate book of the bank, it once having been cut off and pasted again to the stub, as were all certificates not delivered:

40. No. 918. 40 shares.

The Pacific National Bank of Boston, Massachusetts.

No. 918. Date, Octo. 1, 1881. Issued to Mary J. Eaton, of Boston.

This certifies that Mary J. Eaton, of Boston, is proprietor of forty shares in the capital stock of the Pacific National Bank, Boston, Mass., transferable only on the books of said bank in person or by attorney on surrender of this certificate.

Boston, Octo. 13, 1881.

A. L. BENYON, *President.*

J. M. PETTENGILL, *Cashier.*

The bank kept a book called the stock ledger, with an index, containing, in ledger form, the names of the stockholders, with their places of residence, and showing, in a credit and debit stock account with each one, the number of shares held by each. The entry therein relating to the defendant as it stood at the time of the appointment of the receiver and stands now is as follows, viz:

"Mary J. Eaton, Boston.

"1880.		1878.	
"Sept. 1. To 40 shares, 40__	4,000	Jan. 16. By 40 shares, 40__	4,000
		1881.	
		Oct. 1. " 40 do. 40__	4,000"

The accounts with other shareholders were similar in form to this, and the bank kept no other list of the names and residences of its shareholders and the number of shares held by each.

At what time this certificate and entry were made does not appear except by the books. This certificate was never called for, taken by, or tendered to said Thayer or to the defendant, and neither of them had any knowledge that the certificate or entry was made unless it is implied from facts hereinafter found and stated. No certificates in the proposed increase were ever tendered by the bank to any persons to whom they were made, but were delivered when called for.

Daniel Needham, a national bank examiner, being requested to do so by a vote of the directors of November 19th, 1881, and acting also by virtue of his office, proceeded to and did examine and report upon the condition of the bank as it was November 18th, 1881, to the bank and the Comptroller of the Currency, a copy of the report being annexed, marked Exhibit B. In this report the matter of the capital stock was stated thus:

Capital stock paid in	$500,000
New capital stock paid in	461,370

He was placed in charge and possession of the bank and of its funds, assets, records, and books by said Comptroller for the pur-

poses of an examination, and the bank remained under his
19 charge and possession with its doors closed to general business until on or about March 18, 1882, the directors having meantime no control or possession of the assets of the bank or the moneys received or paid out on its account except under the supervision and control of said examiner.

Between December 8 and December 13, 1881, the counsel of the bank, in pursuance of a vote of its directors of the former date, went to Washington, had a conference with the Comptroller of the Currency, and explained the situation of the bank's affairs to him, and after discussion of matters between them returned, and on December 13, 1881, the directors of the bank passed the following votes as the result of such conference and discussion:

"Voted, That whereas it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that held by them;

"And whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock should be payable October first;

"And whereas $461,300 of said new stock has been taken and paid in;

"And whereas $38,700 thereof has not been taken and paid in:

"Voted, That said $38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

"Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association according to law."

After November 18, 1881, no more of the new stock or the rights could be sold at par.

The proceedings of the directors' meetings of December 10, of December 14th, 1881, and of Jan. 2, 1882, copies of which were sent at the time to the Comptroller of the Currency, and the correspondence between the said Comptroller and said Needham appear in Exhibits hereto annexed, marked, respectively, C, D, E, F, and G.

The cashier of the defendant, by direction of the directors,
20 sent the following certificates, duly sworn to by the cashier, to the Comptroller of the Currency, together with a copy of the foregoing votes of December 13, 1881.

"Pacific National Bank of Boston.

"DECEMBER 13, 1881.

"To the Comptroller of the Currency, Washington, D. C.:

"It is hereby certified that the capital stock of the Pacific National Bank of Boston has been increased, pursuant to the articles of association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred sixty-one thousand three hundred dollars.

"[SEAL.] J. M. PETTENGILL, *Cashier.*"

(Jurat omitted.)

On receipt of said certificate and copy the Comptroller of the Currency sent to the bank the following certificate:

"TREASURY DEPARTMENT,
"OFFICE OF THE COMPTROLLER OF THE CURRENCY,
"WASHINGTON, *Dec.* 16, 1881.

"Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of 'The Pacific National Bank of Boston, Mass.,' has been increased to the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with its articles of association, and that the whole amount of such increase has been paid in: Now, it is hereby certified that the capital stock of 'The Pacific National Bank of Boston, Mass.,' aforesaid, has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid in to said bank as a part of the capital thereof, and that the said increase of capital stock is approved by the Comptroller of the Currency.

"In witness whereof I hereunto affix my official signature.

"[SEAL.] JOHN J. KNOX,
"*Comptroller.*"

There was no vote of the stockholders of the bank relating to the increase or reduction of its capital stock, unless it be that of Jan. 10, 1882. On the 16th of December the Comptroller sent to the bank the following communication:

21 "WASHINGTON, *Dec.* 16, 1881.

"To the Pacific National Bank of Boston, Massachusetts:

"The entire capital stock of The Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred dollars ($961,300), having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred per cent. upon its shareholders *pro rata* for the amount of capital stock held by each,

and that if such deficiency shall not be paid and said bank shall refuse to go into liquidation as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of the Revised Statutes of the United States.

"In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

"[SEAL.] JOHN JAY KNOX,
"*Comptroller of the Currency.*"

No communication was made to the defendant or to George L. Thayer, her agent, with reference to said votes of the directors of December 10, 13, and 14, or with reference to any change in the proposed increase of the capital of the bank, and no notice was given her or him that any certificate had been made of stock in said supposed increase, and neither she nor he ever assented to any change in the proposed increase in the sum of $500,000, unless such notice and assent is found in or implied from facts herein found and stated. After paying the $1,000, on September 28, neither of them appears to have taken any action or made any inquiry with reference to the stock in the proposed increase, except as shown by the facts found & stated hereinafter on the testimony of Thayer, until the 10th of January, 1882, when, before the opening of the annual meeting hereinafter referred to, she made the following demand upon the bank, in writing, delivered to its president:

"BOSTON, *January* 10, 1882.

"To the Pacific National Bank:

"The conditions upon which you received $1,000 of me on the 28th day of September, 1881, not having been performed, I hereby demand repayment of said $1,000.

MARY J. EATON,
"By J. H. BENTON, JR., *Att'y.*"

The votes of the directors were recorded on the books of the bank kept at the bank, but neither she nor her agent Thayer ever looked at the books to ascertain what, if anything, had been done with reference to the proposed increase of capital.

22 December 19, 1881, the directors voted to call the annual meeting of the stockholders, to be held January 10, 1882, and the following notice was printed in newspapers published in Boston, and was received by the plaintiff:

"Pacific National Bank.

"The annual meeting of the stockholders of this bank, for the choice of directors and for any other business which may legally come before them, will be held at their banking-rooms, 105 Devonshire

street, on Tuesday, January 10, 1882, at eleven o'clock in the forenoon.

"J. M. PETTENGILL."

Special notice was also sent to the stockholders that the matter of the assessment would come up for action. At this meeting the examiner made a report of the condition of the bank, a board of directors was chosen, and after a discussion and statement by the counsel of the bank of the facts in regard to the increase of its capital stock, and a discussion as to how much in fact had been paid in under the vote to increase it to a million dollars, and of the legal result thereof, and of the vote of December 13, 1881, and statements that there had been conferences with the Comptroller of the Currency in reference to the position on that question, the order or notice of the Comptroller of December 16th, 1881, being read, and it being stated that unless the assessment was made the bank would have to go into the hands of a receiver, as therein stated, the following vote was adopted by stock vote of 5,494 shares in favor and 55 shares against:

"Voted, In accordance with the notice of the Comptroller of the Currency dated December 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent. upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

"Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith."

Of the $961,300 assessed $742,300 was paid under this vote, defendant paying nothing thereon. The defendant did not attend such meeting, but her counsel was present, acting as her proxy and representing only the forty shares of the original stock held by her in the bank. He acted as one of the committee to collect, sort, and count the votes cast, but he did not vote upon any stock.

March 14, 1882, the defendant brought suit in the State court to recover said $4,000, and on May 10th, 1887, she recovered final judgment therein for $4,088. May 14th, 1887, the receiver sued out a writ of error to the Supreme Court of the United States, which was allowed by the acting chief justice of the State court, returnable to the October term, 1887.

The record in the State court is admitted, saving all objections to its competency or materiality.

March 18, 1882, by permission of the Comptroller of the Currency, the directors took full possession of the assets of the bank, and the bank resumed and continued to do a general banking business, claiming that the capital of the bank was $961,300, until May
23 20, 1882, when the bank again stopped payment, closing its doors, and on May 22, 1882, Linus M. Price was appointed receiver of the bank by the Comptroller, and the bank passed into his hands to be wound up, with liabilities of about $2,500,000 and assets worth about $500,000.

It appeared that before the meeting of the stockholders the counsel of the defendant met the counsel for the bank with reference to

her claim that the money paid by her should be paid back if the whole amount was not subscribed, defendant's counsel claiming that the money should be paid back, because the additional increase had not all been taken and paid in. George L. Thayer, as trustee, held forty shares of the old stock, and acted as to that and in the proceedings herein stated the same as he did as agent for the defendant, he being the agent and attending to her business in the matter.

The annexed testimony of George L. Thayer is put into the case by the plaintiff.

The foregoing facts are admitted by both parties for the purposes of this case only, saving to each party all objections to the competency or materiality of any of them, no objection being taken to form or mode of proof.

J. H. BENTON, JR.
A. A. RANNEY.

Testimony of George L. Thayer.

Q. Your father, I believe, was the old president of the Exchange Bank?

24 A. He was.

Q. And Mr. Pettengill, the cashier of the Pacific Bank, and Mr. Benyon both came from your father's bank?

A. They did.

Q. Do you know whether they knew that this belonged to the Thayer trust?

A. I am very sure they did. Mr. Benyon was one of the witnesses to my father's will.

Q. Now, what was the purpose of holding it in this form, in your name instead of in the name of both of you, if any?

(Objected to, and question withdrawn.)

Q. Now, Mr. Thayer, did you pay to the bank any other money for stock—for new stock—except that which you paid on the 28th day of September? I mean aside from the Eaton money.

A. Any other than these two ones?

Q. Yes.

A. No other than these two amounts.

Q. You paid on the 28th of September $4,000 for new stock on account of the forty shares which you held belonging to this trust?

A. I did.

Q. Other than that did you yourself or with any other person as trustee pay any money to the bank?

A. No, sir.

Q. And this trust was for the benefit of your sister, Olive T. Child?

A. Yes.

Q. You say you think Mr. Pettengill and Mr. Benyon knew that fact?

A. He said he suspected it.

Q. What do you know about it?

A. I know that Mr. Benyon knew it, because I had conversation with him.

Mr. RANNEY: You can state what the conversation was, I think, if it is material. I will waive any objection to it.

Q. Now, Mr. Thayer, after you paid this in you never received any certificate?
A. No.
Q. None was ever tende-d to you?
A. Never.
Q. Did you receive notice of the annual meeting?
A. I believe I did.
Q. Did you attend it?
A. I did not.

25 Cross-examination by Mr. RANNEY:

Q. Mr. Thayer, have you got your original certificate here?
A. I think Mr. Benton has it.

(Mr. Benton passes certificate to Mr. Ranney.)

Mr. RANNEY: It runs to George L. Thayer, trustee?
Mr. BENTON: Yes, sir.
Mr. BENTON: The certificate had better be put in evidence.

Q. You were then trustee with your brother?
A. I was.
Q. Now, what was the conversation, with Mr. Benyon whereby you think he knew whom you were trustee for?
A. Well, I don't know at this late day that I can give the conversation.
Q. In the first place when was it, Mr. Thayer?
A. When was the conversation?
Q. Yes.
A. In regard to the bank generally?
Q. Yes.
A. It was at the time the bank was forming. I knew Mr. Benyon and I knew what his difficulties were and I was rather a sympathizer with him, and I talked with him frequently in regard to it, and it was owing to my personal acquaintance with him that I took it. I must say that I had an inward conviction that it was not quite right.
Q. You didn't, I suppose, tell him what money you were using to take it, did you?
A. He knew it was from my sister.
Q. You didn't tell him in taking this stock what money you were using; did you tell him what money you were using to pay for the original stock?
A. I am quite sure so, for another reason.
Q. Give the facts. I don't like reasoning.
A. Not another reason, but another fact.
Q. You may state the fact.

A. My sister, Mrs. Child, was also firmly impressed in regard to Mr. Benyon——

Q. No matter about that.

A. Well, she wanted me to take it, and, at her request, I did take it, and Mr. Benyon——

Q. Now, did you say anything to Benyon about it?

A. I can't say absolutely at this time what I said.

Q. It has been your idea that he knew about whom you were taking it for, but that is merely an inference of yours?

26 A. No, sir; I am very sure he did know.

Q. Well, state how you know.

A. I cannot state any more than that.

Q. Then it is in your mind simply as a matter of inference that he knew it? If you so told him I want to know when and where it was.

A. I can't tell at this time.

Q. You only believe it was so because of his knowing the contents of your father's will?

A. Well, the whole surroundings of the case led me to think so. He had a strong Newton clientage and my sister lived in Newton.

Q. Had you more than one trust?

A. No.

Q. You were trustee for others than your sister?

A. I was for Mrs. Eaton; I was her guardian.

Mr. BENTON: Not at this time?

The WITNESS: Well, that stock was taken by me—the Eaton stock.

Q. Now, when you went to take this new stock you had received notice of the vote, had you not?

A. Notice of what?

Q. Had you received notice of the intention to increase the capital stock when the vote was passed?

A. Yes.

Q. Did you go to see the vote?

A. Go to see the vote?

Q. Yes.

A. No, sir.

Q. And you went on and paid the money. Did you pay for these forty shares and that of Mary J. Eaton at the same time?

A. I did.

Q. And you took a receipt in each case just alike?

A. Yes, sir.

Q. They had printed forms of receipt that they issued?

A. Yes, sir.

Q. Well, you knew that that stock was payable on the 1st of October, didn't you?

A. That I can't tell you about now.

Q. The notice said so, didn't it?

A. Possibly.

Q. And that you were to have interest to the first of October—the notice says so?

27 A. I think it said something about interest on prepayments.

Mr. BENTON: This is the notice.

Mr. RANNEY: Perhaps this is the identical notice. Will you produce it as such?

(Counsel passes document to witness for examination.)

The WITNESS: Yes, sir; that is it.

Q. Well, when you went there whom did you pay the money to?

A. Mr. Pettengill.

Q. Do you know what occurred between you—what conversation occurred?

A. I can't say now.

Q. Well, give it as near as you recollect.

A. Well, I am utterly at a loss to say.

Q. What?

A. I am utterly at a loss to say what I said at that time to him.

Q. You said something about this stock?

A. Well, as near as I can remember, I said, "Well, Pettengill, how are you getting along?" or some such thing as that. "Are they paying in pretty well?" That was at a time when there was a tightness in the money market and things were close, and Pettengill said, "They are not coming up very strong," or something of that sort; and I didn't exactly like the way the subscriptions were coming in.

Q. What did you say about it?

A. I didn't say anything about it.

Q. Why didn't you like it?

A. Because I didn't think they were paying the money in fast enough, according to what Pettengill stated.

Q. Did you make any remark like this: "What will you do if it is not all paid in?"

A. I didn't say it to him, but I said it to Benyon afterwards.

Q. What did you say to him?

A. It rather startled me, and a day or two afterwards I went and saw Benyon, and I said, "How is this getting along? How are you getting along?" and he said they didn't pay in very well. I asked him what he would do if it was not paid in, and he said, "I suppose we shall have to make it up among ourselves," or something of that sort. The idea was that if they didn't come up to time, it was the custom of the country to make up the stock in that sort of way.

Q. That was some two or three days after you paid it?

A. Yes, sir.

Q. When did you go in again?

28 A. I don't know that I ever went. I don't know that I ever talked with either of them after that.

Q. Did you ever, from that time, go to make any inquiry about it?

A. Never to my knowledge.

Q. Well, are you sure you didn't, Mr. Thayer?

A. I am sure that I did not. I was very dissatisfied, and I went and consulted my attorney as to what was best to do about it.

Q. How early did you do that?

A. Shortly after that time. I cannot carry the dates in my mind.

Q. Shortly after the first of October?

A. No; I think it was later than that; I don't know when.

Q. Was it after the suspension of the bank or before?

A. I can't tell you now, at this time, when that was.

Q. Between the time you saw Mr. Benyon and the time when the bank suspended business you knew of it, I suppose?

A. I knew of it; yes.

Q. Didn't you go to the bank to make any inquiry?

A. I did not.

Q. Didn't you concern yourself at all to see whether the whole amount of the $500,000 increase had been got?

A. I don't think I took any measures in regard to it at all.

Q. You didn't concern yourself about it?

A. No, sir.

Q. Why did you cease concerning yourself after the time that you thought so much of it that you went and saw Mr. Benyon?

A. Well, I can't tell you now.

Q. You didn't go to inquire whether it had all been taken?

A. I did not.

Q. Well, by your receipt you were entitled to your certificate of stock as well as the others were, if it was all taken up suddenly; in any event, by going and surrendering your receipt you would get the certificate?

A. Yes.

Q. Well, why didn't you go and get the certificate?

A. I consulted my attorney, and he advised me not to.

Q. Why?

A. Perhaps he knows; I can't say. I suppose there was a reason in his mind.

Q. When was that?

29 A. Some time previous to the time I made the notice——

Q. That is, as late as January 10, 1882?

A. I can't carry dates in my mind at all.

Q. Did you do it before the bank suspended, the 18th of November?

A. I think so.

Q. Before it suspended?

A. I think so; yes.

Q. Did you then know that the stock was not taken—the whole amount?

A. It was the common report.

Q. Then you had common report before the bank suspended business that the whole amount of the stock had not been taken, had you?

A. Yes.

Q. Well, are you quite sure of that?

A. I am quite sure of it.

Q. Did you go to see whether the whole amount had been subscribed?

A. I did not.

Q. Never made any inquiries of your own—didn't go to see Mr. Benyon?

A. I did not.

Q. Nor Mr. Pettengill?

A. I did not.

Q. You didn't go and demand your money back, then, until the 10th of January, 1882?

A. I can't carry dates in my mind at all.

Q. No. Well, did you go to see whether the certificates had been issued to other people?

A. I did not.

Q. Well, when the bank failed on November 18, 1881, didn't you go then to inquire into the condition of the bank?

A. I did not.

Q. Made no inquiry about it?

A. No, sir.

Q. Didn't go to ascertain how many certificates had been issued or how much stock had been paid in?

A. No.

Q. Or whether the bank had taken the money that had been paid in by the stockholders and used it in their business as capital and lost it?

A. No, sir.

Q. Did you have any curiosity about it?

30 A. I am not prepared to say I didn't have any curiosity, because it was a curious matter from the beginning. There has been a deal of curiosity from the start.

Q. Well, it would seem that if you had curiosity about it and doubts about it, you took no steps to object to it?

A. I had full doubts in my mind what——

Q. You took no steps to object to it to the officers of the company?

A. I turned the matter over to my counsel and left him to take care of the case.

Q. And that is all you did?

A. That is all I did.

Q. And when the bank failed it became quite notorious, didn't it, November 18?

A. Yes, sir.

Q. It was become well known then, was it not——

A. Yes, sir.

Q. That the capital was not increased to the full amount of half a million?

A. Yes.

Q. You knew that?

A. Yes.

Q. How soon after the failure of the bank, November 18?

A. I can't tell you the dates.

Q. Directly?

A. I can't tell you.

Q. You can tell whether it was immediately or directly after?

A. Tell what?

Q. You can tell whether it was directly after that or long time after?

A. I can't carry it in my mind at all.

Q. Isn't it true that it became notorious, on that appearing——

A. That the bank had failed?

Q. Yes; that the half a million hadn't been paid in?

A. Yes, sir.

Q. Didn't you know that Mr. Needham was in charge of the bank and was there making examination?

A. I think I knew it by report.

Q. And didn't you know that immediately after that suspension a proposition was made to resume again, to resuscitate the bank?

A. I did.

Q. What did you know about that?

A. I don't know anything more — that they were making endeavors to start again.

31 Q. And did you know or hear of the fact that the Comptroller had directed them to make an assessment of one hundred per cent. on the stock in order to get money with which to carry on the bank?

A. I heard of that.

Q. And did you know of a stockholders' meeting being called in December?

A. I can't tell you about that; I don't seem to remember. I know there were meetings; I think there were.

Q. Have you kept the notice?

Mr. BENTON: I think I have it.

Mr. RANNEY: The notice you received, have you got that? (Mr. Benton passes the document to Mr. Ranney.) This is January 4, 1882. "At the annual meeting of the stockholders of the Pacific National Bank, to be held at their banking-room on Tuesday, January 10, at 11 o'clock a. m., will come up the matter of an assessment on their stock, and if not convenient for you to be present please sign and return enclosed proxy. Lewis Coleman, president."

Q. Now, how soon did you go and consult counsel?

A. Mr. Benton can tell you that better than I can; I can't remember.

Q. Can't you fix the date?

A. I can't fix any date at all.

Q. Wasn't it after this meeting had been called?

A. I can't tell you; I can't carry the dates in my mind.

Mr. RANNEY (to Mr. Benton): Can you fix the date, Mr. Benton?

Mr. BENTON: It was before the bank suspended that he came to me in the first instance.

Mr. RANNEY: Can you fix how near before the bank suspended?

Mr. BENTON: I don't think I can. When it became notorious that the bank was not getting along well he came and talked with me about it.

Q. Who prepared that notice?

A. What notice do you refer to, sir?

Q. This demand for the money back.
A. Mr. Benton.
Q. Were you present when it was delivered?
A. I was not.
Mr. RANNEY: I understand you to say, Mr. Benton—I take your word for it—that that was delivered on the morning of January 10, before the meeting was held?
Mr. BENTON: Yes.
Mr. RANNEY: Delivered to whom?
Mr. BENTON: To Mr. Coleman.
Mr. RANNEY: Mr. Coleman was then president of the bank.
32 Q. Well, your father was an old bank man, and I don't know but you are a bank director.
A. No, sir; he was president of the Exchange Bank for a good many years.
Q. Did you ever go to look at the records on the books of their proceedings?
A. Never.
Q. Did you ever go to look at the stock ledger?
A. Never.
Q. See any of the books of the bank; did you ever go to look and see what they showed about this increase of stock from the time you paid that money on the 28th of September to the time you gave that notice?
A. No, sir; I never looked at the books of the bank at all.
Q. Never consulted any of them?
A. No, sir.
Q. You never went to make any inquiry of any man connected with the bank about the condition and situation of things, either?
A. No, sir.
Q. After you had that talk with Benyon, about two days after you paid the subscription?
A. No, sir.
Q. Was your brother in town at that time?
A. No, sir; he resided in New York.
Q. Are you quite sure you did not go to attend the stockholders' meeting?
A. I did not.
Q. Did you employ counsel to go?
A. I think Mr. Benton went; my impression is he went.
Q. He was your counsel?
A. I left the matter entirely in his hands.
Q. You knew that he was there?
A. I assumed that he went there. I assumed he would do what was proper.
Q. You were representing Mary J. Eaton at the time?
A. Yes, sir.
Q. In the case of Mary J. Eaton, if I recollect rightly, there was a proxy you had?
A. Yes, sir.
Q. Was there a proxy in this case?

Mr. BENTON: No.

Q. You knew that Mr. Benton went; did he report to you afterwards?

A. Well, he has reported so many things that I couldn't tell what he said then.

Q. Well, were you called upon to pay the assessment laid then?

A. Was I called upon?

33 Q. Yes; that voluntary assessment laid January 10.

A. No; I think not.

Q. Did you go to see the president about it?

A. No, sir.

Q. You knew the bank resumed?

A. Yes, sir.

Q. Did you go to see whether you remained on the stock ledger as a stockholder of the eighty shares?

A. No, sir; I never looked at any of the books.

Q. You never looked to ascertain?

A. I never looked to ascertain.

Q. You knew people went and got their certificates?

A. I didn't know that.

Q. You had done business at the bank, hadn't you?

A. I suppose so.

Q. Don't you know that the practice is to go and get the certificate, generally, when a man is entitled to a certificate, assuming that he is entitled to it; assuming that he is entitled to it, you know that the practice is for a man to go there and get it and receipt for it?

A. I never got a certificate before at a bank, but I got it at the time I paid my money.

Q. You considered it your duty to go to the bank and take your certificate if you were entitled to it?

A. I supposed that was the proper course to take.

Q. And you never went to look to see whether your certificate was made out?

A. Never.

Redirect examination by Mr. BENTON:

Q. Did you know that any ever was made out in your name?

A. I did not.

Q. That is, from your knowledge?

A. From my own knowledge; no, sir.

Q. Did you know or did you receive any notice that any was made for you?

A. I did not.

Q. Or that your name was put in the list as a stockholder of the new stock?

A. I did not.

Q. You left this matter wholly with me to investigate and to advise?

A. I did.

34 Q. And from the time you paid your money you did nothing?

A. I took no further action in the matter whatever.

Q. Simply left it in my hands?

Mr. RANNEY: When did you say he left it in your hands?

Mr. BENTON: When?

Mr. RANNEY: Yes.

Mr. BENTON: I am not testifying now.

Mr. RANNEY: I don't want to call you as a witness, but I will take your statement about it.

Mr. BENTON: If you want it as a fact there is no objection to your having it. I think that is all.

Recross-examination by Mr. RANNEY:

Q. You have no means of fixing the time when you left it in the hands of your counsel?

A. No; I can't fix it definitely.

Q. Well, how nearly will you fix it so that you will swear to it?

A. Oh, I can't swear to it. I am one of the worst men in the world about dates.

Q. And you won't swear it was before the bank suspended?

A. It is impossible for me to remember dates.

Q. You might remember the event—whether you left it in his hands before the bank suspended?

A. I can't tell you; Mr. Benton knows better than I do.

Q. Do you know of any occasion for your leaving it in his hands before the suspension of the bank on the 18th of November, 1881?

A. Yes; I was dissatisfied with it the day I paid my money.

Q. Dissatisfied with what?

A. I was sorry that I had made it—made the investment.

Q. And yet you didn't exhibit your anxiety by going to make any inquiry after you and Mr. Benton had the conversation?

A. The horse was stolen; no use to go back then.

Mr. RANNEY: That is all.

35 EXHIBIT 1.

BOSTON, *Sept.* 16, '81.

A. I. Benyon, president. J. M. Pettengill, cashier.

Pacific National Bank, 105 Devonshire street.

BOSTON, *Sept. 13th*, 1881.

At a meeting of the directors of this bank, held this day, it was voted—

"That the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them."

Subscription to the new stock will be payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

J. M. PETTENGILL, *Cashier.*

J. M. Pettengill, cashier:

I subscribe to forty shares of the above.

MARY J. EATON.

36 EXHIBIT A.

List of Payments on Account of New Stock from September 1 to November 18.

1881.		
Sept.	15	1,500 00
	16	5,000 00
	17	2,100 00
	19	3,300 00
	20	1,000 00
	21	500 00
	22	1,600 00
	23	3,000 00
	24	1,600 00
	27	5,700 00
	28	16,500 00
	29	53,300 00
	30	42,800 00
Oct.	1	192,200 00
	3	30,700 00
	4	21,273 87
	5	10,326 13
	6	1,770 00
	7	2,000 00
	8	16,000 00
	10	7,800 00
	11	1,000 00
	12	400 00
	14	3,000 01
	15	7,500 00
	17	1,000 00
	18	1,000 00
	21	1,000 00
	22	500 00
	25	2,100 00
	27	13,500 00
	28	4,000 00
Nov.	3	400 00
	7	5,000 00
	11	500 00
	15	500 00
		$461,370 00

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EXHIBIT B.

Report of Bank Examiner to Comptroller, Nov. 18, 1881.

No. of bank, 2373.

Examiner's report of the condition of the "Pacific National Bank," located at Boston, in the county of Suffolk, State of Massachusetts, at 6 o'clock p. m., Nov. 18, 1881.

A. I. Benyon, president. J. M. Pettengill, cashier.

Resources:

			Dollars.	Cts.
1.	Notes and bills discounted		4,186,300	27
2.	Overdrafts		26,539	55
3.	U. S. bonds to secure circulation		500,000	00
4.	U. S. bonds to secure deposits			
5.	U. S. bonds on hand			
6.	Other stocks, bonds, and mortgages			
	See general remarks		273,500	00
7.	Due from app'd reserve agents, viz.			
8.	Due from other national banks		151,700	43
9.	Due from State banks and bankers		4,322	84
10.	Banking-house	$		
11.	Other real estate			
12.	Furniture and fixtures			
13.	Current expenses	$22,232 73		
14.	Taxes paid	289 62		
			22,522	35
15.	Premiums paid		8,593	75
	Interest		38,431	54
38 16.	Checks and other cash items		1,466,243	84
	17. Exch's for C. H., includ'g gold ch'ks			
18.	Bills of other national banks		9,694	00
19.	Bills of State banks			
20.	Fractional currency (including nickels)			
21.	Specie, viz:			
	Silver coin	$3,049 68		
	Gold coin			
	Gold Treasury notes			
			3,049	68
22.	Legal-tender notes			
23.	U. S. cert's of dep. for legal tenders			
24.	5% red'n fund with Treas. U. S.		13,500	00
25.	Other funds with Treas. U. S.			
	Cash short		5,311	19
	Total		6,709,709	44

Liabilities.

1. Capital stock paid in		500,000 00
New "		461,370 00
2. Surplus fund		74,142 82
3. Discount	$65,135 67	
4. Exchange		
5. Interest		
6. Premiums		
7. Profit and loss	7,080 05	
		72,215 72
8. Circulation received	$450,000 00	
On hand and returned		
		450,000 00
9. State bank circulation outstanding		
10. Dividends unpaid		435 00
11. Individual deposits, viz:		
Subject to check	$1,062,540 10	
Demand certif's	1,695,500 35	
Time certificates		
Certified checks		
Cashier's checks		
		2,758,140 00
12. United States deposits		
13. Deposits of U. S. disbursing officers		
14. Due to national banks		1,473,240 18
15. Due to State banks and bankers		137,695 18
16. Notes and bills rediscounted		685,589 61
17. Bills payable		
Cash over		96,879 48
Total		6,709,709 44

Dividends and Surplus.

(Section 5199 of the Revised Statutes of the United States.)

Date of last dividend, July 1, 1881; amount, $15,000; carried to surplus, $14,239.48.

Loans and discounts:

On paper with two or more individual or firm names	$2,265,315 17
On single-name paper (one person or firm) without other security	301,518 35
On mortgages and other real estate security	252,659 17
On U. S. bonds payable on demand	
On other stocks, bonds, etc., payable on demand	1,366,807 58
All other loans	

Included in the above are—

Bad debts as defined in section 5204 of the Revised Statutes of the U. S.		
Other suspended and overdue paper	$371,095	87
40 Liabilities of directors (individual and firm) as payers	204,747	30

Loans exceeding the limit prescribed by section 5200 of the Revised Statutes of the U. S., viz:

N. M. Jewett, $100,000; Henry Waterman, $140,000; Geo. E. Horn, $100,000; Chicago, Burlington and Quincy R. R. bonds, $100,000; Katahdin railroad bonds, $99,500; T. C. Weeks, $192,850.

General Remarks.

Directors Pacific National Bank.

Leonard Whitney.	Geo. N. March.
E. M. Fowle.	Lewis Coleman.
Arthur Seward.	Edwin Ray.
John E. Cassidy.	J. H. Whitaker.
M. P. Springer.	John Shepard.
J. H. Sanborn.	A. I. Benyon.

In my last examination of this bank I called especial attention to its manner of making loans by the issuing of certificates of deposit, and suggested that in a financial crisis such a system might be attended with peril. I also called attention to the names of parties who were borrowers, many of which were new to me and to the character of the collaterals, many of which I know nothing about.

During my examination, which continued through many days, at times entire days, and at times fragments of days, with examinations elsewhere carried on to a greater or less extent, I saw some of the directors, Mr. March and Mr. Whitney more than any others, but to all that I saw I expressed anxiety for the welfare of the bank on account of its loans based on its credit represented by certificates of deposit and the peculiar character of many of its collaterals, about which I knew nothing, and urged the importance of a careful examination of the paper and securities of the bank and of the president's manner of doing business. The gentlemen that I saw all assured me that my urgently expressed request should be complied with and I felt comparatively easy, for I knew that my examination had been thorough, and, if the loans were good, the bank was in a healthy and prosperous condition.

The promises made, however, were never kept; and subsequently to the forwarding of my report to the Comptroller, when I inquired of Mr. March, who is still one of the board of directors, if
41 the examination by the directors had been made, he replied that it had not; that the directors met for the purpose of examination, and the president, being informed of the purpose of the meeting of the directors, "flew into a passion," and said, "If the directors cannot trust the thorough examination of Col. Needham I will resign." Other conversation between a member or members

of the board and the president was had on this matter and the examination was abandoned. I replied to Mr. March in language substantially as follows: The responsibility of the bank is upon the directors, and they can never shield themselves by placing it upon the president.

Had the examination of the directors been made the character of the collaterals and the system of doing business by the president would have unquestionably been changed and the result would have been different.

In reading the reply of the president to the letter of the Comptroller of Feb. 19th I find that he promised to comply with the express wishes of the Comptroller, but it was in promise alone that the compliance was made. A more reckless management than had ever before been conceived almost immediately after began. The credit of the bank was loaned to a greater and greater extent, and the ambition of the president seemed to be not so much security as how large he could swell his loans with a pledge of the borrower that the certificates of deposit on the money loaned should not be drawn for a period of time after the loan was effected.

For instance, in September, 1881, he loaned one hundred thousand dollars to Geo. E. Horn, of New York, and took as the only security a blank check signed by John Steward. This check has only the signature, no date, no amount, and might have been given for one thing or another, or, as far as I could see, might have been stolen from a check book. We have written to New York to make inquiry, but as yet have no reply.

Another instance: Oct. 7th, 1881, N. M. Jewett borrowed the credit of this bank to the amount of eighty thousand dollars, and an acceptance of an item of real estate to the amount of twenty thousand dollars established an aggregate debit of one hundred thousand dollars. Where the item of real estate called twenty thousand came from I am as yet unable to ascertain. The bank now shows to represent this hundred thousand dollars a mortgage of real eastate in Boston, and, so far as I can see, the security was taken for an original debt, and is contrary to the statute.

One instance more will be enough to completely establish my charge of reckless management. In October, 1881, the bank loaned its credit to Henry Waterman for one hundred thousand dollars, and took for security $143,800 of the stock of the Southern Maryland railroad, which has no market value and is, at the best, a very doubtful matter.

42 Now, at these times the bank was absolutely poor, had no money whatever to loan, and the only possible advantage it could get was the temporary use of the means which its credit thus loaned represented, the parties promising not to draw on the credit for two or three months. It seems almost impossible to believe that these and many other equally hazardous transactions were entered into without some ulterior and hidden motive on the part of the president, but I have in vain failed to find one.

The certificates of deposit, in a large number of instances, represent the legitimate deposits of money; many of these draw interest.

How large a number are certificates representing credit only I am unable to determine, but evidently this amount is of great magnitude. I enclose herewith paper marked "A," which will show the individual and total certificates issued.

In the same way, by the issuance of certificates under promise that the money should not be drawn for a period of time, although no such expression is indicated on the certificate, the bank has carried on, within the last eight months, an enormous real estate business, to wit:

Of the Home Savings Bank it has purchased real estate in Newton	10,000	
From the same bank, real estate in Boston	10,000	
From the same, another item of real estate in Boston	4,500	
From the same, French's wharf	22,759	17
From the Mercantile Savings Institution, real estate in Boston	40,000	

These are all original and illegal transactions. The deeds of the first-named items bear date in Oct., 1881; of the third-named, Apr. 4th, 1881; of the fourth, October 12th, 1881, and of the fifth the date is January 17th, 1881. I said to the president, in the presence of the directors, no such property was in this bank on the 31st of January, 1881, and he admitted in all their presence that the trade was not consummated until February, 1881, and that the deed was dated back. Most of this property is subject to mortgages, which the bank must carry if it continues to hold, and the bank holds nothing but the equities in its assets.

Together with the directors, I have carefully gone over the call loan (so called), the aggregate amount of which, in round numbers, is sixteen hundred thousand dollars, and in marking off what might be considered doubtful we have an aggregate of nearly one hundred thousand dollars, which would need time and care, and if it came at all—and very likely a large portion of it might—would come very slowly.

43 This is independent of the one hundred thousand dollars of Hore, to which I have heretofore alluded, and which has attached to it the blank check of John Steward.

In the discounts there appears the enormous aggregate of three hundred and seventy-one thousand and ninety-five $\frac{87}{100}$ "overdue." This enormous amount has accumulated from about twenty thousand dollars at the time of my January examination. I herewith send a detailed statement, marked "B." Many of these items have collateral, and are undoubtedly collectible, but a large amount will very likely be slow of collection.

The bank has lodged at the Central National Bank of Boston collateral to secure loans amounting to	$238,502	55
At the Five-Cent Savings Bank	107,000	
At Brown, Rileys & Co.	10,000	
At the Howard National Bank	115,000	

To secure loans which, with the exception of the loan at the Central National, have a margin which will undoubtedly be realized to apply to the unsecured liabilities of the bank.

At the Central National, independent of the indebtedness acknowledged by this bank, is a claim of two hundred and fifty thousand dollars, which this bank holds nothing to represent. This claim, on the pare of the Central, has the *prima facie* evidence of the checks of this bank on the Eliot. There is no doubt but that Mr. Weeks owes this amount to somebody—he admits that—but there is no evidence that he owes it to the Pacific. How the Central National comes in possession of the checks of the Pacific, if it does not owe it that amount, has been a matter of protracted investigation by me.

I have reached the conclusion that the checks were temporarily loaned and not returned, or that they were given for a consideration, and the representative of that consideration has been mislaid or destroyed.

The prospect of litigation to establish this question is very good.

"Other stocks, bonds, and mortgages" I called attention to in my preliminary report, of which I desire this to be the concluding part. That there would be a large loss on those items, if a forced sale was made, there can be no doubt.

All of the bank balances have been verified, with the exception of those noted on the sheet which I herewith send, marked "C." I do not think the differences of unverified balances are of any considerable magnitude.

I herewith also send a sheet, marked "D," which contains a full and complete list of the cash items as they appear in the bank. Many of these items are undoubtedly collectible, and no excuse but reckless negligence on the part of the president and cashier can explain their accumulation. The Weeks checks, which constitute the great bulk of the list, to wit:

Aug.	9th,	1881.	Check on Broadway National Bank, drawn by Weeks to the order of Day		10,000
"	19,	'81.	Drawn by Weeks to the order of Day		50,000
Sept.	3,	'81.	" " "		25,000
Nov.	15,	'81.	" " "		20,000
"	"	"	" " "		25,000
"	"	"	" " "		50,000
"	"	"	" " "		50,000
"	"	"	Check of Nat'l Security Bank, by Weeks to the order of Day		20,000
"	"	"	On North Nat. Bank, by Weeks to the order of Day		75,000
"	"	"	On North Nat. Bank, by Weeks to the order of Day		50,000
"	17,	"	On North Nat. Bank, by Weeks to the order of Day		877,500
			Aggregating		1,262,500

Unsecured. No difficulty was experienced in passing Weeks' checks through the clearing-house until Aug. 9th, 1881, when ten thousand dollars came back and was carried in cash items.

On Aug. 19th one of fifty thousand dollars came back and was placed in cash items. On the 15th day of October checks aggregating three hundred and fifteen thousand dollars came back, and this decided the temporary fate of the bank.

The check given on the seventeenth was a check in settlement, and, according to the books of this bank, represents the entire balance due from Weeks to this bank.

The transaction of taking checks of this bank on the Eliot National Bank and paying in checks drawn on other national banks which went regularly through the clearing had been prosecuted by Weeks to a greater or less extent for a year. During this long time the transactions were made to balance every night. The transactions began in a comparatively small and, so far as I can see, in an apparently legitimate way. From time to time they grew until the aggregate reached well into a million a day.

In the earlier history of these transactions, and for a long time afterward, reaching into the early summer, many gentlemen believe that Mr. Weeks was perfectly solvent, and had it not been for the crisis precipitated by the assassination of the President his failure would not have occurred. Be this as it might, there can be no question as to the illegitimacy of these transactions, out of
45 which the Pacific National Bank never realized one single dollar. No motive, except to do an immense business, can be assigned for the strange conduct in allowing these transactions on the part of the president.

In looking over the assets and liabilities I consider the bank and its shareholders in a most precarious condition, and unless Mr. Weeks can furnish the equivalent of at least five hundred thousand dollars in current funds and the stockholders pay in one million more I would not consider even the possibility of reorganization.

I come now to the final consideration of this terrible catastrophe—terrible to the innocent depositors who may have the inconvenience of long delay and possible loss; terrible to the shareholders, who must, in any event, for the time being, sink their entire capital; terrible for the directors, who had timely warning from the examiner and from the honorable Comptroller of the Currency with regard to the illegal and careless manner in which the president was conducting the business of the bank, and terrible for the business interest of society, which receives the shock of violated trust so detrimental to all its interests.

Bringing the first great fault to the door of the directors, who, when notice was given, should have persisted in a most rigid examination, I come to the cashier. In his custody were the funds of the bank. To him was submitted every item intended for the clearing. He was a man of long experience. He was taken from a neighboring bank, and the directors were influenced in his selection by his reputation of a careful and conservative man. No one knew better than he that clearing-house checks always represented cash. Out of his hands every day passed the checks that were given to Weeks, and it was for him to know whether or not he received an equivalent.

Could it be possible that for months a business of drawing and balancing checks on the part of Mr. Weeks could have been continued from day to day, and a man of long and varied experience like the cashier of this bank have no suspicion? If it is possible to

imagine that for the nine months of increasing business of this character the cashier had no suspicion on the ninth day of August, 1881, when the first check of Mr. Weeks of ten thousand dollars came back, there could be excuse no longer; but even then no communication was made to a single member of the board of directors, and the drawing of checks and the acceptance of Weeks' checks as an equivalent went on.

On the 19th of August a check of $50,000 came back, but still not a word from the cashier, and on the third of September another of $25,000, but yet not a word, although these returned and dishonored checks were entered day after day in "cash items" by the teller. The transactions still continued without one word of disclosure being made to the directors from this trusted servant, who was receiving a large salary to guard the interests of the bank.

46 Confidence must begin somewhere; without confidence there can be no credit; without credit there can be no bank; without the bank there can be no extended business. The directors had the right to confide in their cashier, certainly to the extent that he would not accept in exchange for the funds of the bank in the form of a clearing-house check anything that was not the equivalent of money. The cashier cannot hide behind the president. He is an independent officer of the bank and his duties are well and clearly defined. His trust has been violated, and the immediate cause of this disaster is chargeable to him.

The president of this bank must be next considered. He was made president of this bank when the fiery tongue of scandal was pursuing him with relentless ardor. How has he returned the confidence so freely given? No one knew better than he what was and what was not legitimate banking. He knew, for the Comptroller of the Currency had told him, that loaning the credit of the bank was illegitimate and perilous business. He knew that making loans through the medium of certificates of deposit was more dangerous than making loans on legitimate deposits. He knew the transactions of buying real estate, loaning on real estate, loaning in excess of the limit, loaning by the hundreds of thousands of dollars on questionable security and in a careless manner, were all blameworthy and reprehensible. He knew that securing the deposit of a life insurance company by taking out life policies on himself and son and charging the premium of $1,941.05 to the bank was unparalleled in the history of banking. He knew that buying old stone, taken as débris from city houses, and issuing certificates amounting to eleven thousand dollars therefor was monstrous and reckless. He knew that continuing to prosecute his business in a manner condemned by the Comptroller and without asking the directors to share with him in the responsibility was high-handed and unjustifiable. There is no excuse for these two high, trusted, executive officers of the bank.

The matter is still under advisement whether the stockholders will make good the losses or the bank go into the hands of a receiver.

The principal part of the "cash over" in the statement forwarded as a preliminary report belonged in the loan account. The principal part of the discrepancy in the loan account was the result of our hurried manner in taking it and is now mostly explained.

The real estate all appears in the call loans, and I have treated it under the head of "on mortgages and other real estate security."

The classification of the loan is the best I could give in the present condition of affairs, time collateral loans being treated with the two-named paper.

In "other suspended and overdue" I have classified all the overdue and bad debts, finding it difficult to determine how much of this amount should be treated as "bad debts." My own judgment
47 is that a very considerable amount of the "other suspended and overdue" should strictly be treated that way.

The question has been raised as to whether the new stock is liable to assessment under the law, the increased capital not being all paid in. Can you give me information on this point, as it is very important in the reorganization?

Of illegal and illegitimate transactions not mentioned elsewhere in this report may be stated the following:

An agreement with Taunton Savings Bank to deliver a deed of fifteen houses on Madison Square, Boston	7,500
Four bonds of Nantasket Co.	4,000
One bond Pleasant Valley & Utah	1,000
Taken of stockholder to represent balance due on new stock of the bank and standing in the assets as	5,000
100 shares Pacific National Bank stock purchased for a customer, but no agreement by which the customer can be held	10,400
Three notes of W. B. Worcester	18,000

Worcester being a man whose responsibility and place of business are both unknown. In some form or other I have alluded to the most striking features of the loan account. In summing up the situation I have to say that on the 26th instant I made a statement of the condition of the bank to the directors. This statement I preferred to put in writing, but as they objected to that, fearing it might reach the public, and thus prejudice their case, I submitted it without manuscript. On the 29th, at the request of the directors, I made a statement to some forty gentlemen, composed of the directors and the largest stockholders of the bank, who had been invited in for consultation. This statement was, also, at the request of the directors, made without manuscript, although, being made to a promiscuous body, it was much less complete than my first statement to the bank. At the adjournment of this meeting I was waited upon by a committee, and presented with a letter, of which the following is a copy: Boston, Nov. 29th, 1881. Col. Daniel Needham, bank examiner. Dear Sir: At a meeting of the stockholders and directors of the Pacific National Bank, held this day, at the office of the association, the fol-

lowing resolutions were adopted unanimously: Resolved, That the thanks of the directors, stockholders, and depositors of the Pacific National Bank are due and are hereby tendered to Col. Daniel Needham for his earnest efforts to ascertain the condition of the bank, as well as for the valuable suggestions he has made looking to its reorganization. (Signed) Lewis Coleman, chairman. I take the liberty to incorporate this communication into this report. The names of the directors, which will be found under the head
48 of General Remarks, are among the most honored names of Boston's business men, leaving out the name of A. I. Benyon. My view of the situation, from the first, has been of the most serious character. Much of the paper upon which reliance is placed to me looks doubtful, and I am yet to be convinced that the losses may not approximate seventeen hundred and fifty thousand dollars—possibly more. Although it must be admitted that the dishonored checks of Weeks precipitated this disaster, it is to me equally clear that the enormous issue of certificates as a matter of credit on illegal and questionable loans would have brought ruin in the end, and that the end could not be far off. In conclusion, I can only say I have failed to find an explanation of these strange transactions, and, if not based upon criminality, must be explained by idiocy or insanity. I shall advise the Department immediately of the conclusion reached by directors.

DANIEL NEEDHAM, *Examiner.*

To the Comptroller of the Currency, Washington, D. C.

EXHIBIT C.

SATURDAY, *Dec.* 10, 1881.

Present: Messrs. Coleman, Ray, Sewall, Shepard, Sanborn, Springer, Whitaker, and Dyer.

Voted, That T. J. Hamilton act as secretary *pro tem.*

Voted, That the reading of the minutes of previous meeting be dispensed with.

Report of Mr. William J. Best.

The statement that I am about to make is necessarily predicated in a great measure upon the accuracy of the tables furnished by Col. Needham and the appraisal or valuation that you have put upon the assets where they are represented only by discounted paper. As to the tables of Col. Needham, I assume that they are correct.

On this occasion I shall depart from the regular order in such cases by first directing your attention to the liabilities:

49 They aggregate $6,466,471 42

Made up as follows:

First. Circulation	450,000 00
Second. Claims of depositors and creditors	5,055,101 42
Third. Stockholders	961,370 00
The nominal or face value of the assets is	6,633,888 68
And the estimated value	5,102,875 34
The deficiency, therefore, appears to be	1,363,576 08

In the event of the bank resuming business, the deficiency would be reduced $315,400 by the terms of settlement agreed upon in the adjustment of the account of the Central National Bank; and, as it is now in contemplation to resume, I shall treat the deficiency as being $1,048,176.08. Were the estate converted into money to-day the deficiency would probably reach nearly, if not quite, double the amount last named, but judicious management during the next twelve months could hardly fail to realize from the assets at least $1,000,000 more than they would bring at forced sale. To enable you to form your own conclusions upon this point, I will explain in what manner my tabulation has been made.

The "cash items," so called, foot up $1,407,538.89. This amount includes the whole of the checks illegally issued to Mr. Weeks. In ascertaining what portion of that large sum may be counted as a good asset in the adjustment of the affairs of the bank, I have taken credit for every dollar we have rated as "good," $605,512.08. I have also credited the account with $29,058.09, under the head of "good but slow;" and of the "doubtful," which aggregate $721,953.26, I regard as a good asset the sum of $360,000.

The "bad" assets in this account amount to $51,013.46, which I assume to be worth to the bank in round figures $10,000. In the arrangement you are about to consummate with Mr. Weeks you expect to have returned $500,000 in the checks and certificates of the Pacific Bank. Information received from Mr. Stone justifies the belief that $565,000 will be surrendered; consequently, I have credited the good assets with $562,500, that being the difference between the $700,000 I have rated as bad and the whole amount due on the Weeks' checks.

50 The "receiving teller's cash" appears nominally worth $57,743.02. Of this amount, however, only $20,134.00 can safely be treated as a good asset. The "good but slow" items aggregate $26,424.22; the "doubtful," $6,720, and the "bad," $4,464.80. By proper management I think the bank may realize $49,558.22. The difference, $8,184.80, I regard as worthless.

The amount of "notes and bills discounted" is placed by Col. Needham at $4,186,300.27. This embraces both call and time loans and several items of considerable magnitude that properly belong under the head of mortgages and real estate. You gentlemen have aided me in appraising at least 75% of this item of assets, and I have been guided as to the remainder by your appraisal. The "good live assets" foot up $1,600,000; "good but slow," $600,000; "doubtful," $600,000; "bad," $986,300.24. I believe 50% of the doubtful and about 25% of the bad may be collected within a reasonable time should the estate be fairly managed and the bank resume business. In other words, I regard as a good asset $500,000 of the doubtful and bad classifications of notes and bills discounted, the aggregate being $1,586,300.24.

The "overdrafts" amount to $26,539.55, of which sum it is safe to assume that the bank will realize about $10,000.

The other assets, which I need not enumerate, include small amounts of cash, U. S. bonds, and other stocks and bonds, which I

have reason to believe can be made readily available for the sums at which they have been entered in my statement.

Included in the "good but slow" item of assets is the large indebtedness of the Bay of Fundy Co., E. M. Fowle, Fowle & Carroll, Beman, Van Steenberg, Eager, and a few others, which I believe can be made to realize the sums set opposite their names, respectively.

As already stated, the deficiency appears to be $1,363,576.08. To make good the assets this sum would be required to-day in addition to the certificates to be surrendered by Weeks.

A DIRECTOR: In addition to the $500,000?

Mr. BEST: Yes, sir; from the deficiency I have named, as
51 previously stated, must be deducted $315,100, the amount to be written off in the settlement proposed to be made with the Central National Bank in the event of the reorganization of the Pacific.

Gentlemen, after a careful examination of the demand certificates issued by this bank, and some other details of its management, it is my candid opinion that you can successfully resist an amount of apparent indebtedness more than sufficient to offset the sum of $86,808.08, which is the actual deficiency over and above the assessment of 100 % upon the capital, supposing it to be $961,370. I therefore say to you, from the best information at my disposal, that there need be no difficulty in reorganizing this bank provided $961,370 in cash shall be put in and the $500,000 to $565,000 of certificates shall be surrendered by Mr. Weeks. In the event, however, that you should fail to have set aside any portion of the bank's indebtedness as it stands to-day, you would have assets of a nominal value of more than a million and a half dollars from which to realize about $86,806.08. A large percentage of these are, of course, absolutely worthless, but many of them are of such a nature and have been placed in this bank under such peculiar circumstances as to justify me in saying that the persons who were parties to the transactions may be proceeded against criminally, and if vigorous measures could be instituted against them I feel quite certain that a large sum of money—perhaps from four to five thousand dollars—could be realized within the next two or three years, at most, from assets which I now regard as possessing no real value.

Voted, That the report of Mr. Best be accepted.

Voted, The following resolutions:

Resolved, That a reorganization of the Pacific National Bank can and will be immediately effected upon the completion of the surrender of outstanding certificates now held by T. C. Weeks and others, and that the Comptroller of the Currency be requested,
52 upon the completion of such transaction, to order an assessment of 100 % in the capital stock of this bank, and that said assessment will make good the capital stock of this bank.

Resolved, That, in view of the progress thus far made in the prosecution of this work, Col. Daniel Needham, the national bank examiner, be requested to forward the result of this meeting embodied in the above resolution to the Comptroller of the Currency and request

further time to enable the board to complete the transactions now in process necessary for successful reorganization.

Voted, That the counsel of the bank, Richard M. Stone, Jr., and the director, Geo. N. March, now in Washington, be notified of the action of the board as follows:

"Directors have been in session since half past eight. At eleven forty-five resolutions were adopted to reorganize immediately on the surrender of certificates by Weeks, as heretofore agreed, and that the Comptroller be requested to give reasonable time in which to perfect this scheme of reorganization. Weeks may close to-day. Best will see you Monday morning and give all details. See Comptroller and have him direct Colonel Needham as the circumstances require. Answer immediately.

"(Signed) "LEWIS COLEMAN,
"*Chairman, for Directors.*"

Voted, The following resolutions:

Resolved, That W. J. Best, who has conducted the examination of the bank, be requested to proceed to Washington immediately and lay fully and in detail befor the Comptroller of the Currency the present condition of this bank and scheme of reorganization and ask his approval of the same.

Voted, The following form of circular to be sent to creditors:

53 "The board of directors of the Pacific National Bank have adopted resolutions covering a scheme of reorganization and the early resumption of business. Upon the surrender of certain illegally issued certificates, which, it is believed, will soon be in the control of the bank, the directors will request the Comptroller of the Currency to assess the stock of the bank for $1,000,000. This amount will place the association upon a sound basis. Nevertheless, time will be required to convert assets that are perfectly good, but which will be sacrificed by a forced sale. Hence, in the interest of the depositors, the directors deem it wise to ask the larger of them to agree to accept payment of their claims in three equal instalments, payable in four, eight, and twelve months, respectively, with interest at the rate of four per cent. per annum.

"The directors are of opinion that the assets, which consist chiefly of notes and bills discounted, can be converted within a few months, and therefore reserve the right at any time during the period of extension to pay the whole or any portion of this indebtedness.

"We trust that you will see the wisdom of this course and sign the agreement hereto attached and return the same to us at your early convenience.

"Respectfully, etc.,

"LEWIS COLEMAN,
"J. H. WHITAKER,
"JOHN SHEPARD,
"*Executive Committee.*"

For the reason above set forth and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, the under-

signed hereby agrees to and with Lewis Coleman, J. H. Whitaker, and John Shepard, committee, to extend the time for the payment of the indebtedness of the Pacific National Bank to the amount of — dollars for four, eight, and twelve months, in three equal instalments, the same to bear interest at the rate of four per cent. per annum until paid.

Voted, To take a recess until four o'clock.

After recess it was voted to adjourn.

THOS. J. HAMILTON,
Secretary pro Tem.

54 EXHIBIT D.

WEDNESDAY, *Dec.* 14, 1881.

A meeting of the directors of the Pacific National Bank was held at 10 o'clock a. m.

Present: Messrs. Coleman, Sewall, Ray, Dyer, Shepard, Springer, Fowle, Sanborn, and March.

Voted, That Edwin M. Fowle, act as secretary *pro tem.*

Voted, That the reading of the minutes of the last meeting be dispensed with.

Voted, The following resolutions, offered by Mr. Dyer and seconded by Mr. Ray:

Whereas on the 18th day of November, 1881, it was discovered that the Pacific National Bank was unable to pay on demand its liabilities to depositors and creditors;

And whereas, since the date named, the directors, assisted by Col. Daniel Needham, national bank examiner, and Wm. J. Best, have been engaged in an investigation to determine the liabilities and assets of said bank;

And whereas said investigation enables said directors to fix the apparent liabilities at $6,774,633.60 and the assets at the par or nominal value of $6,782,558.53, showing an apparent excess of assets over liabilities to the amount of $7,924.93;

And whereas said assets are not now worth their par or nominal value, but would probably realize, in cash, with judicious management, $5,308,895.34, which would leave an apparent deficiency of $1,465,738.26;

And whereas in the adjustment of the account of the Pacific National Bank with the Central National Bank the latter has agreed in the event of the reorganization of the Pacific National Bank to yield of its alleged claims against the former the sum of $315,400, and has also agreed to return to the Pacific National Bank good assets of said bank now held by said Central National Bank as collateral to the amount of $55,252.55, thereby reducing the deficiency of the Pacific National Bank to $1,095,085.71;

And whereas, with such knowledge of the affairs of said Pacific National Bank as the directors have been able to obtain by diligent investigation and inquiry, they are of opinion that it should immediately be reorganized in order fully to protect all of the interests involved;

And whereas the larger part of the assets of said bank consists of

notes and bills discounted, of which a considerable portion could not now be converted into money without sacrificing the interests of the creditors of the association:

And whereas T. C. Weeks has returned to this bank $150,000 of its checks and has agreed to return $350,000 of additional checks in a few days: Therefore—

Resolved, That, in the opinion of the directors of said bank,
55 the interests of both creditors and stockholders require its early reorganization.

Resolved, That the Comptroller of the Currency be requested to authorize the stockholders of the association to levy an assessment of 100% upon the par value of the capital stock now paid in, viz., $961,300, upon condition that said Weeks shall return to this bank $350,000 additional checks, as agreed, before said assessment shall be made.

Resolved, That in the event said bank shall be reorganized and shall resume business, with the approval of the Comptroller of the Currency, the board of directors will, and they do hereby, guarantee the payment of $133,785.71 out of the assets by them classed as "doubtful" and "bad," aggregating the sum of $1,473,663.19, and now treated by said directors as possessing no present money value, the condition of said guarantee being that it will cease and determine so soon and so far as the said sum of $133,785.71 shall have been realized from said "doubtful" and "bad" assets, and said directors shall be held only for so much of said sum of $133,785.71 as may not be realized from said "doubtful" and "bad" assets.

Resolved, That, in the opinion of said directors, said assessment upon the stock of said association and the said guarantee of $133,785.71 will place said association upon a sound financial basis; nevertheless, as time will be required to properly convert the assets of the association, which consist chiefly of notes and bills discounted, it is to the interest of the depositors and creditors to agree to a reasonable extension of time for the payment of their several claims. Recognizing this fact, the Central National Bank has agreed to give an extension of one year, from Jan. 1, 1882, on the whole amount of its claim as compromised, viz., $500,000, at 4% per annum.

Resolved, That a copy of these resolutions be forwarded to the Comptroller of the Currency and his approval asked of the scheme of reorganization herein set forth, and that he grant the directors until Jan. 15th, 1882, to perfect said scheme of reorganization.

Resolved, That W. J. Best be, and he is hereby, authorized to reorganize the books of account of the Pacific National Bank and to adopt such measures, with the approval of the board of directors, as he may deem necessary to perfect the scheme for the reorganization of said bank and the collection of its assets in pursuance of the votes of the board of directors this day recorded.

Adjourned.

EDWIN M. FOWLE,
Secretary pro Tem.

56 EXHIBIT E.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *December* 13, 1881.

SIR: I had a conference with the committee who arrived here yesterday in reference to the affairs of the Pacific National Bank.

It is proposed to make an assessment for the full amount of the stock of the bank, and it is believed that when this is paid up the capital stock will be unimpaired and the bank in possession of abundant funds to meet all their obligations.

I request that you will, immediately on receipt of this letter, write me in reference to the present condition and prospects of the bank, and if you see any reason to doubt its ability to resume business, as proved.

Very respectfully, JNO. JAY KNOX,
Comptroller.

Daniel Needham, Esq., nat. bank examiner, 45 Milk street, Boston, Mass.

57 EXHIBIT F.

OFFICE DANIEL NEEDHAM,
NATIONAL BANK EXAMINER, 45 MILK STREET,
BOSTON, *Dec. 14th*, 1881.

SIR: Your letter of the 13th is at hand.

In reply to your inquiry I will say: If Weeks will pay in on his unsecured loans five hundred thousand dollars, as has been proposed, and the arrangement with the Central National Bank with reference to the adjustment of the disputed claim is perfected and an obligation is given by the directors guaranteeing a certain amount of doubtful paper, which amount is stipulated in the resolution, a copy of which after its passage will be immediately forwarded to you by the board, then an assessment of one hundred per centum on the present capital of the bank as it now stands on the books would, in my judgment, make the bank solvent.

Many of the directors have the full confidence of the public, and under the conditions I have specified above I should have no doubt of the full ability of the bank to resume.

In speaking of the present capital upon which assessment must be made I mean the old $500,000, together with the new of $461,300, making subject to assessment $961,300. In my judgment it is most important that the bank should be revived if possible.

If it falls the Central National must also fall, and the widespread injury could not be estimated.

I am gratified to say that the condition of the bank has been strengthened since it has been in my charge by the securing of some questionable debts, and careful management will undoubtedly save to the bank a large amount which would otherwise be lost.

If the bank goes on upon the plan now laid out, and which will be presented to you for approval within two or three days, and which embodies the features noted in this letter, then there must be a delay of some weeks, and I would like your approval to place my clerk in charge during more or less of the temporary absence I may make in continuing my work of examinations elsewhere.

Very respectfully, DANIEL NEEDHAM,
Nat Bank Examiner.

To Hon. John J. Knox, Comptroller of the Currency, Washington, D. C.

58 EXHIBIT G.

MONDAY, *January 2nd*, 1882.

A meeting of the directors was held this p. m. at 3 o'clock.

Present: Messrs. Lewis Coleman, Shepard, Springer, Dyer, Sanborn, Whitaker, and Fowle.

The meeting was called to order by the president; J. H. Whitaker, secretary *pro tem.*

59 Voted, That Lewis Coleman be, and is hereby, authorized to execute and deliver in the name of this bank a contract between this bank and Theodore C. Weeks, and the contract between the Central National Bank, Theodore C. Weeks, and this bank, copies of said contracts being set forth below:

Memorandum of Agreement Between The Pacific National Bank of Boston and Theodore C. Weeks, Made This Thirty-first Day of December, A. D. 1881.

Said bank agrees to accept in full satisfaction and discharge of any and all claims which it has against said Weeks and against John S. Day, for which it holds no collateral security, amounting to one million five hundred and eighty-seven thousand five hundred dollars (but not including herein the debts against either of said persons, for which it holds collateral security), seven hundred and five thousand dollars, to be paid in manner following, viz: Five hundred thousand dollars thereof to be delivered in checks or certificates of deposit heretofore issued by said bank to said Weeks or said Day on or before January 5th, A. D. 1882, one hundred and thirty-five thousand dollars of the balance of said seven hundred and five thousand dollars in money and seventy thousand dollars thereof in money, checks, or certificates of deposit, issued as aforesaid, to be delivered on the day of the resumption of business by said bank, but not later than the tenth day of January, A. D. 1882, whether said bank shall then have resumed or not.

Upon the delivery of any of said checks, certificates, or cash said bank is to surrender to said Weeks his checks now held by said bank in the proportion the amount delivered bears to said amount of seven hundred and five thousand dollars, until there shall have been delivered twelve hundred and sixty-two thousand five hundred dollars in said checks, and thereafterwards said bank shall release

the balance of its said claim in the same proportion until it is wholly released, and, upon the delivery of said checks and money, amounting to seven hundred and five thousand dollars, said Weeks and said Day are to be released and discharged from all liability to said bank upon any debts due it by them for which it holds no collateral security, amounting, as aforesaid, to one million five hundred and eighty-seven thousand five hundred dollars, and from any and all liabilities on any checks or certificates of deposit of said bank which form a part of said one million five hundred and eighty-seven thousand five hundred dollars which have been heretofore issued by said Pacific National Bank, and which bear the indorsement of said Weeks or said Day; and said bank agrees, without further consideration, to guarantee and save harmless said Weeks and said
60 Day from any liability on their part on any and all checks or certificates of deposit heretofore issued by said bank and forming a part of said one million five hundred and eighty-seven thousand five hundred dollars, and to execute and deliver any and all papers necessary to confirm such release and guaranty, provided said Weeks shall perform this agreement in full.

Said Weeks agrees to make said deliveries upon the terms aforesaid, and the Central National Bank of Boston hereby requests said Weeks to fulfil this agreement and assents thereto. Nothing herein shall be construed as an admission of any liability by said Pacific National Bank to said Central National Bank, in case said Pacific National Bank should not resume business or in case this agreement should not be performed.

In witness whereof said Pacific National Bank has caused these presents to be signed and delivered by Lewis Coleman, its president, hereunto duly authorized, and said Weeks has hereunto set his hand and seal the day and year first above written.

(Signed) T. C. WEEKS.

I hereby agree that the within paper shall not be considered as creating any preference in case of insolvency.

(Signed) HENRY D. HYDE,
Att'y for Central National Bank.

Memorandum of an Agreement Between The Central National Bank of Boston, The Pacific National Bank of Boston, and Theodore C. Weeks.

Whereas said Central National Bank holds certain checks and certificates of deposit of the Pacific National Bank aforesaid, amounting to eight hundred and fifteen thousand four hundred dollars, after deducting the indorsements thereon, upon eight hundred and ten thousand dollars of which said Weeks and John S. Day are liable as indorsers; and whereas said Central National Bank has collected, out of certain collateral deposited with it by said Pacific National Bank, the sum of about fifty-nine thousand dollars, which it has applied to said debt:

Now, therefore, said Central National Bank agrees to accept, in full satisfaction and discharge of the balance of its said debt against

said Pacific National Bank, four hundred and twenty thousand five hundred dollars in the promissory notes of said Pacific National Bank as follows, viz: One for twenty thousand five hundred dollars, payable in six months; one for fifty thousand dollars, payable in nine months, and one for three hundred and fifty thousand
61 dollars, payable in one year, all of said notes to bear interest at four per cent. per annum, payable semi-annually.

And said Central National Bank further agrees, upon the delivery of said notes and seventy-five thousand dollars of its checks held by said Pacific National Bank, to surrender all collateral received by it from said Pacific National Bank, except said sum of fifty-nine thousand — in money, which has been applied as aforesaid, and, further, to surrender all checks and certificates held by it as aforesaid, except three hundred and fifteen thousand four hundred dollars thereof, which are to be delivered to said Weeks, as hereinafter agreed.

And said Central National Bank further agrees to accept of said Weeks, in full satisfaction and discharge of its claims against him and against said Day on said checks and certificates as aforesaid, three hundred and fifteen thousand four hundred dollars and the accrued interest on said eight hundred and ten thousand dollars in the promissory notes of said Weeks as follows, viz: Two hundred and fifty thousand dollars thereof, averaging six months, with interest at six per cent. per annum, secured by the deposit therewith of two hundred and fifty thousand dollars of the receiver's certificates of the Lebanon Springs Railroad Company, so called, and the balance of sixty-five thousand dollars, and notes to cover said interest, in the notes of said Weeks, averaging and payable in one year, with interest at five per cent. per annum; and, upon the delivery of said notes and said collateral by said Weeks, said Central National Bank agrees to deliver to him three hundred and fifteen thousand four hundred dollars in checks or certificates of said Pacific National Bank held by said Central National Bank as aforesaid, to be surrendered by said Weeks to said Pacific National Bank in fulfilment of his agreement with it of even date herewith.

All of said notes, checks, certificates, and collaterals are to be surrendered and delivered, as above provided, simultaneously, and on the fifth day of January, A. D. 1882, to American Loan and Trust Company, or some person to be agreed on, in escrow till said Pacific Bank resumes, with consent of Comptroller, and interest is to be adjusted and notes dated as of January second, A. D. 1882; and, upon delivery from said escrow, said Pacific National Bank and said Central National Bank mutually release each the other from any and all claim, debt, or demand at law or in equity which either holds against the other on account of said eight hundred and fifteen thousand four hundred dollars and said seventy-five thousand dollars of checks of the Central National Bank held by said Pacific National Bank; and, upon the delivery of said notes and collateral to said Central National Bank by said Trust Company or person for said Weeks, said Central National Bank releases and discharges said

Weeks and said Day from any and all liability on account of
62 said checks or certificates, amounting to eight hundred and fifteen thousand four hundred dollars.

Nothing herein shall be construed as an admission of any liability by said Pacific National Bank to said Central National Bank, in case said Pacific National Bank should not resume business or in case this agreement should not be performed.

In witness whereof said Pacific National Bank has caused these presents to be executed and delivered by Lewis Coleman, its president, and said Central National Bank has caused these to be signed and delivered by Henry D. Hyde, hereunto duly authorized, and said Weeks has hereunto set his hand and seal the day and year first above written.

(Signed) CENTRAL NATIONAL BANK,
By HENRY D. HYDE, *Atty.* [SEAL.]
T. C. WEEKS. [SEAL.]

Voted, That in the opinion of the said directors an assessment of 100% upon the stock of the association will place it upon a sound financial basis, provided depositors and creditors shall agree to a reasonable extension of time for the payment of their several claims.

Voted, That depositors and creditors be requested to sign the following agreement and return the same to the bank on or before the 10th inst.

Voted, The following form of circular agreement:

63 We, the undersigned, creditors of the Pacific National Bank of Boston, in consideration of the embarrassed condition of said bank and the agreements of the other parties hereto herein contained, do hereby, for ourselves and our heirs, executors, and administrators, respectfully covenant and agree with said Pacific National Bank of Boston, its successors and assigns, that we will and hereby do extend the time of payment of our several claims as follows, to wit: One-third thereof to be paid in four months from January 1st, 1882; one-third thereof to be paid in eight months from January 1st, 1882; one-third thereof to be paid in twelve months from January 1st, 1882; interest on each instalment to be paid therewith at the rate of four per cent. per annum, the bank to have the right to anticipate any or all of said instalments.

In witness whereof we have hereto set our hands and our common seal, adopted for this purpose only, this second day of January, one thousand eight hundred and eighty-two.

J. H. WHITAKER,
Secretary pro Tem.

64 *Record of State Court.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

MARY J. EATON *v.* THE PACIFIC NATIONAL BANK.

To all persons to whom these presents shall come, Greeting:

Know ye that among our records of our supreme judicial court, holden at Boston, within and for our county of Suffolk, from the first day of January, in the year of our Lord one thousand eight hundred eighty-seven, to the first day of January, A. D. 1888, it is thus contained, the following being the entire record in the case:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } *ss:*

To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of the Pacific National Bank, a corporation existing under the laws of the United States and having its usual place of business in Boston, in said county, to the value of six thousand dollars, and summon the said Pacific National Bank (if it may be found in your precinct) to appear before our justices of our superior court next to be holden
65 at Boston, within and for our said county of Suffolk, on the first Tuesday of April next, then and there in our said court to answer unto Mary J. Eaton, of Boston, in an action of contract, to the damage of the said Mary J. Eaton (as she says) the sum of six thousand dollars, which shall then and there be made to appear, with other due damages; and have you there this writ, with your doings therein.

Witness Lincoln Flagg Brigham, Esquire, at Boston, the fourteenth day of March, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] JOSEPH A. WILLARD, *Clerk.*

Upon which writ is the following return by the officer who served the same, viz:

SUFFOLK, *ss:*

BOSTON, *March* 17, 1882.

I this day attached a chip as the property of the within-named Pacific National Bank, and gave a summons, with an attested copy of this writ, to E. C. Whitney, its cashier, for its appearance to answer at court.

HARUM MERRILL,
Dep'ty Sheriff.

Fees:

Service & tr.	58
Copy	1 00
	$1 58

66 And upon the day on which said writ was returnable the plaintiff, upon entering the same, filed *their* declaration as follows, to wit:

Declaration.

SUFFOLK, *ss:*

Superior Court. April Term, 1882.

MARY J. EATON *v.* THE PACIFIC NATIONAL BANK.

And the plaintiff says that the defendant owes her four thousand dollars and interest thereon from the twenty-eighth day of September, 1881, for money had and received by it to her use at that time.

And in a second count, for the same cause of action, the plaintiff says that on the twenty-eighth day of September, 1881, she paid to the defendant four thousand dollars, which it then agreed to apply in payment for forty shares, of the par value of one hundred dollars each of capital stock in the Pacific National Bank in an increase of said capital stock in the amount of five hundred thousand dollars, which increase of five hundred thousand dollars it then
67 agreed to make, and to issue to her, within a reasonable time after the said twenty-eighth day of September, forty shares of said increase of capital of the par value of one hundred dollars each; and the plaintiff says that the defendant did not so apply said four thousand dollars for the use and benefit of the plaintiff, as it was bound to do, and it did not within a reasonable time thereafter issue and give to her, nor has it at any time issued or given to her, forty shares of said stock of the par value of one hundred dollars each in an increase of five hundred thousand dollars of said capital stock, as it agreed to do, but has wholly failed so to do, and it owes her said four thousand dollars, with interest thereon since the same was paid to it as aforesaid.

By her attorney, J. H. BENTON, JR.

This action was commenced in the superior court begun and holden at Boston, within and for said county of Suffolk, on the first Tuesday of April, A. D. eighteen hundred and eighty-two, when and where the parties appeared, and the defendant corporation, by Morse and Stone, Esquires, its attorneys, filed its answer as follows, to wit:

68 *Defendant's Answer.*

SUFFOLK, *ss:*

Superior Court. April Term, 1882.

MARY J. EATON *v.* THE PACIFIC NATIONAL BANK OF BOSTON.

Now comes the defendant and, for answer to the first count of the plaintiff's declaration, denies each and every allegation therein contained.

And, for answer to the second count of the plaintiff's declaration, the defendant denies each and every allegation therein contained.

And, for further answer to said second count, it says that it is and ever since the year 1877 has been a national banking association duly organized and established under the laws of the United States; that on September, 13, 1881, the directors of the defendant association, being thereto duly authorized, voted to increase the capital stock of said association from five hundred thousand to one million dollars; that thereupon the plaintiff, being the holder of forty shares of the capital stock of said association, became entitled to take forty shares of the new stock upon paying four thousand dollars therefor to the association on or before October 1 then next ensuing;
69 that on or about September 28, 1881, the plaintiff paid the defendant four thousand dollars for said forty shares of new stock, and subsequently, before this action was begun, the same were placed in her name and a certificate was issued to her therefor.

By its attorneys, MORSE & STONE.

Filed May 4, 1882.

And on the fourth day of May, A. D. 1882, Edmund C. Whitney, in behalf of the defendant corporation, filed his affidavit in the words following, viz:

SUFFOLK, *ss:*

Superior Court. April Term, 1882.

MARY J. EATON *v.* THE PACIFIC NATIONAL BANK OF BOSTON:

I, Edmund C. Whitney, cashier, in behalf of the defendant, hereby make oath that I verily believe that the defendant in said action has a substantial defence thereto; that the amount in controversy exceeds four thousand dollars; that the defendant intends to bring the cause to trial, and in its behalf I request that the same may be removed to the supreme judicial court.

EDMUND C. WHITNEY, *Cashier.*

70 SUFFOLK, *ss:*

MAY 4, 1882.

Subscribed and sworn to before me—

RICHARD STONE, JR.,
Justice of the Peace.

Thereupon it was ordered by said superior court to be removed accordingly, and the same was entered in our said supreme judicial court during the April term thereof, A. D. eighteen hundred eighty-two, when and where the parties appeared.

Thence the action was continued from term to term unto the September term, A. D. eighteen hundred eighty-four, when and where the plaintiff appeared, and Ranney and Clark, Esquires, appeared as attorneys for said defendant corporation, vice Morse and Stone, Esquires.

And the action was thence continued from term to term and from sitting to sitting unto the fifth day of May, A. D. eighteen hundred eighty-six, when and where the parties appeared, and after a full hearing the case was reserved, upon the report of the presiding justice, for the consideration of the full court.

And on the thirteenth day of November, A. D. eighteen hundred eighty-six, Ranney and Clark, Esquires, as attorneys for Peter Butler, receiver, filed the following motion, viz:

71 *Motion by Peter Butler.*

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON *v.* PACIFIC NATIONAL BANK.

Peter Butler, of Boston, in the State of Massachusetts, represents that he has been duly appointed and qualified as receiver of the Pacific National Bank in place of Linus M. Price, removed. He therefore asks to be admitted as a party to defend said action.

By his attorneys, RANNEY & CLARK.

Thence the action was continued, and on the twenty-third day of March, A. D. eighteen hundred eighty-seven, it was ordered by the supreme judicial court for the Commonwealth, by its rescript, as follows, to wit:

72 COMMONWEALTH OF MASSACHUSETTS:

Supreme Judicial Court for the Commonwealth, at Boston, March 23rd, 1887.

In the case of Mary J. Eaton *v.* Pacific National Bank, pending in the supreme judicial court for the county of Suffolk, ordered, That the clerk of said court in said county make the following entry under said case in the docket of said court, viz:

Judgment to be entered for the plaintiff for four thousand dollars and interest from January 10th, 1882.

By the court:

GEO. W. NICHOLS, *Clerk.*

March 23, 1887.

Whereupon, on the 30th day of said March, the said receiver, by his attorneys, filed his motion for a rendering of special judgment as follows, to wit:

73 *Motion of Defendant.*

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON
v.
THE PACIFIC NATIONAL BANK: PETER BUTLER, Receiver, Admitted to Defend.

The said Butler, as receiver and in the name of the said bank, comes and moves that a special judgment only be rendered in said action to the effect that the amount found to be due is a just claim

to be allowed in proof before the receiver as a debt due from the bank, with interest only up to May 22nd, 1882, and that no execution on the judgment be allowed to issue against the bank for damages or costs of suit, and that an order to that effect be issued.

By his attorney, A. A. RANNEY.

And also, on said thirtieth day of March, said receiver filed a further motion as to the record in said case, viz:

74 *Motion of Defendant.*

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON

v.

THE PACIFIC NATIONAL BANK, PETER BUTLER, Rec'r.

Peter Butler, receiver, defending said case in the name of the said bank, comes and says that he is directed and authorized by the Comptroller of the Currency to take out a writ of error in said case as soon as a judgment is entered and carry the same to the U. S. Supreme Court, under the provisions of section 709 of the United States R. S. and other laws of the U. S. He therefore asks the court to order the opinion of the court as delivered to be made a part of the record, and also that a certificate may be made that Federal questions were raised by the defendant and decided adversely to the defendant within the provisions of the laws of the United States, so as to entitle the defendant to a writ of error.

By A. A. RANNEY, *Attorney.*

75 And on the eighth day of April, A. D. eighteen hundred eighty-seven, the following agreement was filed by the parties, viz:

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON *v.* PACIFIC NATIONAL BANK.

It is agreed that Peter Butler, as receiver of defendant bank, appeared in said case on May 5, 1886, when said case was heard and reserved by the court, and that it may be entered on the record of the case that he appeared to defend said case in the name of the bank and was admitted for that purpose.

J. H. BENTON, JR.,
For Plaintiff.
RANNEY & CLARK,
Att'ys for Peter Butler, Rec'r.

Whereupon, on the eighteenth day of said April, said receiver filed a motion for a rehearing and new trial, as follows, to wit:

76 *Application for a Rehearing and a New Trial by Defendant.*

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON

v.

PACIFIC NATIONAL BANK, PETER BUTLER, Rec'r, Defending.

Peter Butler, the receiver defending said case, now comes and says that the said case was not heard and tried before the court upon evidence, but counsel undertook to agree upon the facts and prepared the statement contained in the report purporting to be the facts as if found by the court upon a hearing. In truth and in fact, the statement was proposed by the plaintiff's counsel and assented to by defendant's counsel, and the report was put in that form by them and adopted by the court by their consent. The senior counsel was absent at Washington, engaged in the discharge of his public duties, when the case came up and was forced to trial, and the junior counsel agreed to the statement of facts and the report as aforesaid, upon the best of information which he could obtain at the time,

77 but it is now ascertained and can be proved beyond doubt, and there can be no just contention on the point, that a material and perhaps vital portion of the statement of facts found aforesaid is contrary to the truth. The junior counsel, in agreeing to the same, mistook the facts, was ignorant of them himself, and he was misled, misinformed, and deceived by those who, as he supposed, knew them, and of whom he enquired and upon whom he relied for information. Since the opinion of the court was rendered the facts have been ascertained and the deception practiced upon the junior counsel of the defendant made apparent, and it can now be proved and the true basis of the fact established.

The plaintiff therefore asks for a rehearing and a new trial, to the end that the decision, if judgment is to be rendered, may rest upon the true basis of facts and the case properly presented to the United States Supreme Court. He will file directly a statement of the facts as they are and can be proved, verified by affidavits and documentary evidence.

PETER BUTLER, *Rec'r,*
By RANNEY & CLARK, *Att'ys.*

78 And on the tenth day of May, A. D. eighteen hundred eighty-seven, after a full hearing, said motions as to rendering of special judgment, as to record, and for a rehearing and new trial were severally overruled.

Thereupon the motion of defendant that said receiver be admitted to appear in said cause and defend the same as of May 5, 1886, was allowed.

Whereupon, on said tenth day of May, the plaintiff filed his motion for judgment upon the rescript, as follows, to wit:

SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON *v.* PACIFIC NATIONAL BANK.

APRIL 12, '87.

The plaintiff moves for judgment on the rescript.

J. H. BENTON, JR.,
For Plaintiff.

Which motion was allowed, and thereupon it was ordered that judgment be entered in the sum of $4,000 as damages, with interest from January 10, 1882, to May 22, 1882, with costs.

79 It was therefore considered by the court, on the tenth day of May, A. D. eighteen hundred eighty-seven, that the said Mary Jane Eaton recover against the said Pacific National Bank the sum of four thousand and eighty-eight dollars damages, and costs of suit, taxed at $77.49.

And a stay of execution was thereupon ordered.

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said court to be hereto affixed.

Witness Marcus Morton, Esquire, chief justice of our said supreme judicial court, at Boston, this twenty-third day of June, in the year of our Lord one thousand eight hundred and eighty-seven.

[SEAL.] (Signed) JOHN NOBLE, *Clerk.*

The following is the assignment of errors:

80 SUFFOLK, *ss:*

Supreme Judicial Court.

MARY J. EATON
v.
PACIFIC NATIONAL BANK, PETER BUTLER, Receiver.

In matter of the writ of error granted in said case.

The defendant, Peter Butler, assigns as errors in said case the following, to wit:

1. The court has erred in holding that the plaintiff is entitled to recover on the facts found and appearing of record under the statutes and laws of the United States.

2. The court erred in holding that there was an implied condition that the capital stock should be increased and effected to the sum of $500,000, else she was not to be bound and was to have her money

back, the defendant claiming that under the statutes and laws of the United States and the articles of association which are to govern this was not so.

3. The court erred in not holding that the increased capital was valid and that it could not be invalidated by the plaintiff on the facts appearing in detail under the statutes and laws of the United States.

81 4. The court erred in applying to the case the law of the State of Massachusetts and other States and not the statutes and laws of the United States.

5. The court erred in not giving full force and effect to the statutes of the United States and the articles of association.

By RANNEY & CLARK.

Copy.
Attest: (Signed) JOHN NOBLE, *Clerk.*

82 This cause thereupon comes on to be heard by the court, and is argued by counsel for the respective parties, the Honorable Thomas L. Nelson, district judge, sitting.

It is thereupon considered by the court, to wit, October 7, 1887, the Honorable Thomas L. Nelson, district judge, sitting, that the said Peter Butler, plaintiff, receiver, recover of the said Mary J. Eaton, defendant, the sum of five thousand one hundred and seventy-seven dollars damages and his costs of suit, taxed at ninety-seven dollars and seventy cents.

The following bill of exceptions is allowed by the court, and by direction of the court is filed as of October 7, 1887, before entry of judgment herein and made part of the record in said cause:

Plaintiff's Exceptions. (*Filed as of Oct.* 7, 1887.)

Be it remembered that upon the trial of this action by the court, a jury trial being waived by the stipulation of the parties duly
83 filed in writing, the case was submitted and tried upon an agreed statement of facts in writing and the same being filed and made a part of the record is referred to and made a part of this bill of exceptions.

The plaintiff objected to the competency of the record of the case of Mary J. Eaton *v.* The Pacific National Bank, tried in the State court and constituting a part of said agreed facts, contending that the same constituted no estoppel or bar in defence of this action. The court admitted it, and plaintiff excepted, and his exception was allowed. The plaintiff contended and asked the court to rule that if the adjudication in the State court, as shown by the said record from the State court, was competent evidence it was not of itself conclusive in this action and did not operate as an estoppel or bar, and was only to be considered with the other facts agreed in the case.

The plaintiff contended and asked the court to rule that upon all the facts agreed as aforesaid he was entitled to recover the assessment sued for upon the eighty shares of stock declared on. The court declined to so rule, and being of the opinion that he was entitled to so

recover, except for the said adjudication in the State court,
84 he held that said adjudication was of itself conclusive as a bar to the recovery, so far as the forty shares of new stock in question were concerned, notwithstanding the issuing and pendency of a writ of error, and ordered judgment for the amount only of the assessment upon the forty shares of old stock not in dispute—that is to say, in the sum of $5,172. The plaintiff excepted to the ruling in so far as it precluded him from recovering a like sum in addition on account of the other forty shares.

The plaintiff prayed the court that this his bill of exceptions be signed and sealed by the court, and this is accordingly done and the same ordered to be made a part of the record.

Exceptions allowed.

THOMAS L. NELSON,
District Judge.

85 *Assignment of Errors and Prayer for Reversal.*

The plaintiff assigns as errors—

1. The court erred in giving judgment for the assessment sued for upon only forty shares of the stock, and should have ordered judgment for $10,344, and not for $5,172 alone.

2. That the court erred in admitting in evidence the record of the State court in the case of Mary J. Eaton *v.* The Pacific National Bank, contained in the agreed facts, especially in view of the fact that a writ of error was allowed, had issued, and was pending.

3. That the court erred in holding that the plea or answer of an estoppel or an adjudication in bar was sufficient.

4. That the court erred in holding that the said adjudication in the State court was of itself alone conclusive and operated as a bar to the recovery on account of the forty shares of new stock in dispute, and especially in view of the other facts agreed upon and the allowance and pendency of a writ of error.

Wherefore the said Peter Butler, receiver, plaintiff in error, prays that for the errors aforesaid the judgment herein may be reversed.

A. A. RANNEY,
Attorney for the Receiver.

86 UNITED STATES OF AMERICA, } *ss:*
Massachusetts District, }

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record and of all proceedings in the cause entitled Peter Butler, receiver, *v.* Mary J. Eaton, determined in said circuit court, and of the assignment of errors and prayer for reversal filed therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this seventh day of

October, in the year of our Lord one thousand eight hundred and eighty-seven, and of the Independence of the United States the one hundred and twelfth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

87 The United States of America to Mary J. Eaton, of Boston, in the district of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein Peter Butler, of said Boston, receiver of the Pacific National Bank of Boston, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas L. Nelson, district judge of the United States for the district of Massachusetts, sitting in the circuit court, this seventh day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

THOS. L. NELSON,
Dist. Judge.

Due, sufficient, and legal service of the foregoing citation is acknowledged.

J. H. BENTON, JR.,
Att'y for Defendant in Error.

Endorsed on cover: Massachusetts C. C. U. S. No. 1309. Peter Butler, receiver of the Pacific National Bank of Boston, plaintiff in error, *vs.* Mary J. Eaton. Filed November 23, 1887.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 925.

PETER BUTLER, RECEIVER, &c., PLAINTIFF IN ERROR,

vs.

MARY J. EATON.

ADDITIONAL TRANSCRIPT OF RECORD.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 30, 1888.

1 Circuit Court of the United States, District of Massachusetts.

PETER BUTLER, Receiver, Plaintiff,
v.
MARY J. EATON, Defendant. } No. 2033 (A), Law Docket.

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the following is a true copy of additional proceedings in said circuit court in the above-entitled cause, which, by agreements of the parties and orders of the court, are made a part of the record in said cause and are certified to the Supreme Court of the United States as an addition to the transcript of record annexed to the writ of error and return of the circuit court thereon in said cause, filed in said Supreme Court November 23, 1887.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

2 *Agreement of Parties.*

It is agreed that the record in said case may be amended and rectified as follows, to wit:

First. By striking out of the agreed facts this: "The annexed testimony of George L. Thayer is put into the case by the plaintiff" (original, page 23: print, page 18), and by inserting in place thereof the following, viz: "George L. Thayer was examined in the trial in the State court in the case of Thayer and another *vs.* Pacific National Bank, and his evidence as given there is hereto annexed and is to be taken and admitted in this court the same as though the defendant in this suit had called him as a witness and the examination and cross-examination had proceeded with the same questions and answers in this cause."

Second. By inserting therein the omitted portions of the proceedings of and in the State court, as admitted and used in evidence and named in the agreed facts, to wit: The report of the justice upon which the case of Mary J. Eaton *vs.* Pacific National Bank was heard and decided by the supreme judicial court of Massachusetts and the opinion of that court, together with the application of the receiver and all the papers filed with the proceedings in obtaining the writ of error, copies of each of which are hereto annexed—that is to say, copies hereto annexed marked, respectively, "Report, Exhibit A," "Opinion, Exhibit B," "Writ of error proceedings, Exhibit C."

A. A. RANNEY,
Att'y for Pl'ff.
J. H. BENTON, JR.,
For Def't.

3 EXHIBIT A.

Report.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

Supreme Judicial Court. April Sitting, 1886.

MARY J. EATON *v.* PACIFIC NATIONAL BANK.

The defendant is a national banking association organized under the laws of the United States by articles of association, a copy of which is hereto annexed, marked "Exhibit A," and by the adoption of by-laws, section eleven of which is as follows:

"Whenever an increase of stock shall be determined upon it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the bank. If any stockholder shall fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

On the 13th of September, 1881, the capital stock of the defendant was five hundred thousand dollars, of which the plaintiff
4 owned forty shares, which stood in her name on the books of the defendant, and for which she held a certificate, a copy of which is hereto annexed, marked "Exhibit B." On that day the directors of the defendant voted "that the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par to an equal amount to that now held by them," and the following notice of such increase was sent to and received by the plaintiff:

A. I. Benyon, president. J. M. Pettengill, cashier.

PACIFIC NATIONAL BANK, 105 DEVONSHIRE STREET,
BOSTON, *Sept.* 13, 1881.

"At a meeting of the directors of this bank held this day it was voted that the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.

"Subscription to the new stock payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

"J. M. PETTENGILL, *Cashier*."

No subscription books were opened and the plaintiff did not subscribe for any stock in said increase of capital, but on the 28th of

September, 1881, she paid to the defendant four thousand dollars and received therefor the following receipt:

"Pacific National Bank.

"$4,000. SEP. 28.

"BOSTON, *October 1st*, 1881.

"Received of Mary J. Eaton four thousand dollars on account of subscription to new stock.

"J. M. PETTENGILL, *Cashier*."

The whole amount of increase of capital to one million dollars, being five hundred thousand dollars, was never paid in and no notice was ever transmitted to the Comptroller of the Currency that said additional five hundred thousand dollars had been paid in or that the whole amount of such proposed increase of the capital to one million dollars had been paid in, and the Comptroller never issued a certificate stating that the said capital stock had been increased to the amount of one million dollars, voted as above set forth, nor did he ever certify his approval of such increase or that it had been duly paid in as a part of the capital of said defendant, and no action was taken by him respecting any increase of stock from that of five hundred thousand dollars, except as hereinafter stated. Only four hundred and sixty-one thousand three hundred dollars of said proposed increase of five hundred thousand dollars was ever taken or paid in, all of which was paid in prior to November 18, 1881, and was used in the general business of the bank with its other funds. November 18, 1881, the defendant became unable to meet its debts and liabilities, suspended payment thereof, failed to redeem its circulating notes, and thereupon closed its doors to business.

Daniel Needham, a duly appointed examiner of national banks, having made an examination of said bank and having reported its condition to the Comptroller of the Currency, was on said eighteenth day of November, 1881, placed in charge and possession of said bank and all its funds, assets, records, and books by said Comptroller. Said bank remained under the exclusive charge and in the possession of said Needham, with its doors closed to business, until on or about March 18, 1882, the directors thereof having in the meantime no possession or control over the assets of said bank or the moneys received or paid out on account of the bank, except under the supervision, control, and authority of said examiner.

December 13, 1881, the directors of the defendant passed the following vote:

"Voted, That whereas it was voted by this board on the thirteenth day of September last that the capital of this bank be increased to one million dollars and that the stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

"And whereas the stockholders were duly notified of said vote,

and also that subscriptions to the new stock should be payable October 1st;

"And whereas $461,300 of said new stock has been taken and paid in;

"And whereas $38,700 thereof has not been taken and paid in:

"Voted, That said $38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

"Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase, according to law."

On the same day the cashier of the defendant, by direction of the directors and upon suggestion of the Comptroller that such a certificate should be sent to him, sent the following certificate, duly sworn to by the cashier, to the Comptroller of the Currency, together with a copy of the foregoing vote:

"Pacific National Bank of Boston.

"DECEMBER 13, 1881.

"To the Comptroller of the Currency, Washington, D. C.:

"It is hereby certified that the capital stock of the Pacific National Bank of Boston has been increased, pursuant to the articles of association of said bank, in the sum of four hundred and sixty-
6 one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred sixty-one thousand three hundred dollars.

"[SEAL.] J. M. BETTENGILL, *Cashier.*"

On receipt of said certificate and copy the Comptroller of the Currency sent to the directors of the defendant the following certificate:

"TREASURY DEPARTMENT,
"OFFICE OF THE COMPTROLLER OF THE CURRENCY,
"WASHINGTON, *Dec.* 16, 1881.

"Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of 'The Pacific National Bank of Boston, Mass.,' has been increased to the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with its articles of association, and that the whole amount of such increase has been paid in: Now, it is hereby certified that the capital stock of 'The Pacific National Bank of Boston, Mass.,' aforesaid has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid in to said bank as a part of the capital thereof, and that the said increase of capital stock is approved by the Comptroller of the Currency.

"In witness whereof I hereunto affix my official signature.

"[SEAL.] JOHN J. KNOX,
"*Comptroller.*"

There was no vote of the stockholders of the defendant relating to the increase or reduction of its capital stock.

On the 16th of December the Comptroller sent to the defendant the following communication:

"WASHINGTON, *Dec.* 16, 1881.

"To the Pacific National Bank of Boston, Massachusetts:

"The entire capital stock of The Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred dollars ($961,300), having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred per cent. upon its stockholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid and said bank shall refuse to go into liquidation as provided by law for three months after this notice shall have been received by it a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of the Revised Statutes of the United States.

"In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

"[SEAL.] JOHN JAY KNOX,

"*Comptroller of the Currency.*"

7 No certificate of stock in said proposed increase of capital in the amount of five hundred thousand dollars was made by the bank nor was any certificate in said claimed increase of four hundred and sixty-one thousand three hundred dollars received by or offered to the plaintiff; but when the certificate from the Comptroller, made December 16, was received by the bank a certificate of forty shares in said claimed increase of four hundred and sixty-one thousand three hundred dollars was made by the bank, a copy of which is hereto annexed, marked C, which was never called for, taken by, or tendered to the plaintiff, but still remains in the certificate book, and she was then registered in the stock register of the bank as the owner thereof without her knowledge. No certificates in said claimed increase *was* ever tendered by the bank to any persons to whom they were made, but were delivered to them when called for. No communication was made to the plaintiff with reference to said vote of the directors of December 13, or change in said proposed increase, or said certificate of said Comptroller, or said certificate made to her, and she never assented to any change in the proposed increase in the sum of $500,000.

On the tenth of January, 1882, before the opening of the annual meeting, hereinafter referred to, she made the following demand upon the defendant in writing, delivered to its directors:

"BOSTON, *January* 10, 1882.

"To the Pacific National Bank:

"The conditions upon which you received four thousand dollars of me on the twenty-eighth day of September, 1881, not having been performed, I hereby demand repayment of said four thousand dollars.

"MARY J. EATON,
"By J. H. BENTON, JR., *Att'y.*"

On December 10, 1881, the directors voted to call the annual meeting of the stockholders to be held on January 10, 1882, and thereupon the following notice was sent to and received by plaintiff, viz:

"Pacific National Bank.

"The annual meeting of the stockholders of this bank, for the choice of directors and for any other business that may legally come before them, will be held at their banking-room, 105 Devonshire street, on Tuesday, January 10, 1882, at 11 o'clock a. m.

"J. M. PETTENGILL, *Cashier.*"

This notice was also printed in the newspapers then published in Boston. At this meeting the said examiner made a report of the condition of the bank, and, among other things, the following vote was passed, viz:

"Voted, In accordance with the notice of the Comptroller of the Currency dated December 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent. upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata*, for the amount of capital stock of said bank held by each shareholder.

"Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith."

The whole number of votes cast being 5,549, representing 5,549 shares of stock, of which 5,494 were in the affirmative and 55 in the negative.

The plaintiff attended said meeting by her authorized attorney under the following proxy, which was not filed with the bank and on which no vote was cast.

"Know all men by these presents that I, the undersigned, stockholder in the Pacific National Bank, do hereby appoint J. H. Benton, Jr., true and lawful attorney, with power of substitution for myself and in my name, to vote at the meeting of the stockholders in said company, upon my forty shares of said stock, to be held at Boston, January 10, or at any adjournment thereof, with all the powers I should possess if personally present, hereby revoking all previous proxies; and this proxy does not apply to anything but my forty shares of the original stock of said bank.

"MARY J. EATON.

"Witness:
"GEORGE L. THAYER."

Notice of said assessment and vote was forthwith given to plaintiff by said bank, but she never paid any part thereof.

The total amount paid in to said directors by the stockholders on the assessment agreed upon at said meeting, January 10, 1882, was $742,800, and was all paid in prior to May 20, 1882.

On the fourteenth day of March, 1882, the plaintiff brought this suit to recover said four thousand dollars.

March 18, 1882, by permission of the Comptroller of the Currency, the directors took possession of the assets of said bank, opened its doors to business, and continued to do a general banking business, loaning money, receiving and paying deposits, and paying debts and expenses, until the twentieth day of May, 1882, but made no losses or new loans during that period. The bank was closed to business on said May 20, 1882, and the directors voted to go into liquidation; and thereupon Linus M. Price was appointed receiver thereof by the Comptroller of the Currency, and continued in charge of said bank and its assets, books, papers, and records until March 18, 1886, when Peter Butler was appointed by said Comptroller receiver thereof in place of said Price, and said Butler has ever since been in charge of said bank, its assets, books, papers, and records.

The only authority of the bank to increase or reduce its capital was under its articles of association and the by-law hereinbefore set forth and sections 5142 and 5143 of the Revised Statutes of the United States, which were as follows:

"Any association formed under this title may, by its articles of association, provide for an increase of its capital from time
9 to time as may be deemed expedient, subject to the limitations of this title; but the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency, and no increase of capital shall be valid until the whole amount of such increase is paid in and notice thereof has been transmitted to the Comptroller of the Currency and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

"Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of such associations, but no reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

Any other statute laws of the United States may be considered proved as facts and referred to by either party.

Upon the trial before me I found the foregoing facts, subject to any objection by either party as to their materiality or competency, and, at the request of the parties, reserve the case for the consideration of the full court.

WILLIAM ALLEN, *J. S. J. C.*

EXHIBIT A.

Articles of Association.

For the purpose of organizing an association to carry on the business of banking under the sections of the Revised Statutes which authorize the organization of national banking associations, approved June 22d, 1874, and of subsequent acts in addition to or amendatory thereof, the undersigned, subscribers for the stock of said association, do enter into the following articles of association:

First. The name and title of this association shall be "The Pacific National Bank of Boston."

Second. The place where its banking-house or office shall be located and its operations of discount and deposit carried on and its general business conducted shall be in the city of Boston, county of Suffolk, and State of Massachusetts.

Third. The board of directors shall consist of from five to twelve stockholders, and the following persons, Leonard Whitney, Jr., Gideon P. Brown, Marcellus P. Springer, John H. Sanborn, Edward C. Huxley, Moses B. Tower, Edwin Ray, Edwin M. Fowle, J. Henry Whittaker, Arthur Sewall, George C. Rand, and Abner I. Benyon, are hereby appointed directors of this association, to hold their offices as such until the regular annual election takes place, pursuant to the fourth article of these articles of association, and until their successors are chosen and qualified.

Fourth. The regular annual meetings of the stockholders for the election of directors shall be held at the banking-house of this association on the second Tuesday of January of each year; but if no election shall be held on that day it may be held on any other day, according to the provisions of section 5149 of the Revised Statutes, and all elections shall be held according to such regulations as may be prescribed by the board of directors not inconsistent with the aforesaid provisions of the said 5149 section of the Revised Statutes.

Fifth. The capital stock of this association shall be two hundred and fifty thousand dollars, to be divided into shares of one hundred dollars each, but the capital may be increased, according to the provisions of section 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars; and in the case of the increase of capital of the association each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold this office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director, and they shall have power to elect a vice-president, who shall also be a member of the board of *electors*, and to elect or ap-

point a cashier and such other officers and clerks as may be required to transact the business of the association, to fix the salaries to be paid to them and continue them in office, or dismiss them, as, in the opinion of a majority of the board, the interests of the association may demand. They shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make, under said Revised Statutes, for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal, debtor, or otherwise, without the consent of the board.

Seventh. This association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such
11 manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements, and provisions of the Revised Statutes.

Eighth. These articles of the association may be changed or amended at any time by stockholders owning a majority of the stock of the association in any manner not inconsistent with the Revised Statutes, and the board of directors or any three stockholders may call a meeting of the stockholders for this purpose.

In witness whereof we have hereunto set our hands this tenth day of October, eighteen hundred and seventy-seven.

LEONARD WHITNEY, JR.
GIDEON P. BROWN.
MARCELLUS P. SPRINGER.
JOHN H. SANBORN.
EDWARD C. HUXLEY.
MOSES B. TOWER.
EDWIN RAY.
EDWIN M. FOWLE.
JAMES H. WHITAKER.
GEORGE C. RAND.
ARTHUR SEWALL.
ABNER I. BENYON.

EXHIBIT B.

Opinion.

COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *June* 14, 1887.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Mary J. Eaton *vs.* Pacific National Bank, decided on the twenty-third day of March, 1887.

JOHN LATHROP,
Reporter of Decisions.

The following is the opinion of the supreme judicial court for the Commonwealth:

FIELD, *J.*:

When this action was brought the bank was not in the hands of a receiver, and the receiver afterwards appointed has not formally intervened or appeared, but it was understood at the argument that the action was defended by him, and that he desired that it should be prosecuted for the purpose of determining the liability of the bank. See Bethel Bank *v.* Pahquioque Bank, 14 Wall., 383.

12 The case was reserved for the consideration of the full court, presumably under the Pub. Sts., c. 150, § 8. The facts have been found, and, although the questions of law have not been stated in the report, it is plainly the intention of the report to reserve the question of law whether, on the facts found or such of them as are competent, judgment should be entered for the plaintiff or for the defendant. We are of opinion that the reservation is within the power conferred by this section of the statutes, and we consider the case as if it were reserved for judgment upon the facts found, which are in the nature of a special verdict. See Terry *v.* Brightman, 129 Mass., 535.

By the articles of association of the bank "the capital may be increased, according to the provisions of § 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars," and the board of directors shall have power "to provide for an increase of the capital of the association and to regulate the manner in which such increase shall be made." The vote of the directors of September 13, 1881, to increase the capital stock to $1,000,000, which was an increase of $500,000, and the subsequent vote of December 13, 1881, to increase the capital stock by $451,300, instead of $500,000, were therefore both within the power of the board.

The case raises a question which was suggested, but not decided, in Delano *v.* Butler, 118 U. S., 634. It was there said: "It will be observed that, without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock, the plaintiff in error paid for his shares and accepted his certificate. This he

did, in legal contemplation, with knowledge of the law which authorized the association and the Comptroller of the Currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors, and such payment and acceptance of the certificates in accordance therewith might amount, under such circumstances, on his part, to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in, but without insisting upon that point or deciding it we think that the subsequent conduct of the plaintiff in error amounts to a ratification." 118 U. S., 650.

In the present case the plaintiff paid in her money, but did not accept a certificate of stock.

To make the increase of the capital stock valid it must be authorized in accordance with the articles of the association. The whole amount of it must be paid in. Notice thereof must be transmitted to the Comptroller, and he must certify "that it has been duly paid in as part of the capital of such association," and must approve of it. U. S. Rev. Sts., § 5142. The plaintiff, therefore, was compelled to pay in her money before the final action of the Comptroller in order to become entitled to any part of the new stock. Within the maximum of the increase of capital stock provided for by the articles of association the Comptroller could not determine the amount of the increase, except by approving or refusing to approve the
13 amount authorized by and paid into the bank. The united action of the bank or its directors, of the subscribers to the new stock, and of the Comptroller was required to effect an increase of the capital stock; and when the plaintiff paid in her money she ran the risk that the contemplated increase of $500,000 might fail, either because it might not all be subscribed for and paid or because the Comptroller might refuse his approval; but she did not run the risk that if it were all paid in the Comptroller might, without any further action of the bank or its directors, reduce the amount of the increase, because he had not the lawful power to do this. If the Comptroller refused his approval the plan failed. The directors by a new vote might authorize another and a different increase of the capital stock, which, if the amount was paid in and the Comptroller approved of it, would become an actual increase of capital stock; but this would be an abandonment of the first plan by the bank and the adoption of another.

Upon the ordinary principles of contract, if the plaintiff paid in her money for forty shares of stock on the condition that five thousand shares of stock should be created, she could not be bound to take the forty shares if the condition was not performed. If there was such a condition the plaintiff could not be required to take forty shares out of four thousand six hundred and thirteen shares, which the bank by a subsequent vote authorized, unless there is something in the facts which shows that the amount of stock to be created was immaterial, or unless she assented to the change or her assent is to be implied, or unless, on grounds of public policy and the rights of creditors, she cannot be permitted to withdraw her

money after the Comptroller has certified that a certain amount has been paid in as an increase of the capital stock, which amount includes the sum she has paid.

Whether the plaintiff shall become the owner of forty out of five thousand shares of capital stock or the owner of forty out of four thousand one hundred and sixty-three shares cannot be regarded as immaterial, particularly in a corporation where the stockholders are liable to an assessment to the amount of the stock held by each to supply a deficiency in the capital stock (U. S. Rev. Sts., § 5205), and are also held "individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." U. S. Rev. Sts., § 5151.

Neither can we perceive any sound reason why, in legal contemplation, she must be held to have assented to the change whereby the amount of the contemplated increase was reduced to $461,300. She paid in her money under a vote whereby the capital stock was to be increased by $500,000. If this amount was not paid in or the Comptroller did not approve of this increase there was an end of the proposition which had been voted and which she and the bank had in contemplation when she paid in her money. If the directors of the bank, after she paid in her money, abandoned their original vote and passed another vote for an increase different in
14 amount, it is difficult to see how she was bound by it. They were not her agents; the new vote was not passed in furtherance of the original proposition to make the increase $500,000; the vote was not a reduction of the capital stock of the bank, because the increase had not then been made, and the capital stock of a banking association can only be reduced by a vote of the shareholders. U. S. Rev. Sts., § 5143. To make the increase of the capital stock $461,309 instead of $500,000 was essentially a new proposition, authorized for the first time on December 13, 1881, nearly two months and a half after the plaintiff paid in her money.

On the facts found the intention of the directors and of the Comptroller is apparent. The bank failed on November 18, 1881, and, before this, $461,300 had been paid into the bank for new stock, to be created under the vote passed on September 13, 1881. It was not likely that any more money would be paid in for this purpose after the failure of the bank. The bank had received this money, and had used and lost it. On its failure a bank examiner took possession of the bank and its assets and remained in possession until March 18, 1882. While its assets were in the possession of the bank examiner it was decided to make this $461,300 a part of the capital stock of the bank; it would then cease to be a debt of the bank, and the creditors of this sum, having thus been made stockholders, would then be liable to an assessment to an equal amount to supply the deficiency of capital stock, and would also be liable to pay another equal amount to satisfy the debts of the bank. The directors accordingly passed the vote of December 13, 1881, which in form is a reduction of the capital stock by the sum of $38,700, but in fact is a

vote authorizing the increase of the capital stock by $461,300; and they attempted to apply the money paid in under the previous vote to this new increase which they had voted, and then voted that the Comptroller of the Currency be notified that the capital had been increased by this sum, and that the whole amount had been paid in, and they requested the Comptroller to issue his certificate. The cashier on the same day sent to the Comptroller a copy of the foregoing votes and his certificate that the capital had been increased by the sum of $461,300, all of which had been paid in. The copy of the votes sent to the Comptroller informed him that the attempt to obtain $500,000 for an increase of the capital stock had failed, and because it had failed that the directors had fixed the amount of the increase at $461,300 and had declared the money paid in under the previous vote as paid in for the new stock voted on December 13. The Comptroller of the Currency, on December 16, 1881, issued the usual certificate approving of "said increase of capital stock" to the amount of $461,300, and on the same day sent to the bank a notice that its entire capital stock, including the increase he had just then approved, having been lost an assessment of one hundred per cent. must be laid upon the shareholders; otherwise the bank must go into liquidation or a receiver must be appointed, according to U. S. Rev. Sts., § 5234.

It is argued that the certificate of the Comptroller is conclusive on the plaintiff that the sum of $461,300 was actually paid in as an increase of capital stock, and that this includes the amount which she paid. Undoubtedly the public in dealing with a bank do rely to some extent upon the certificate by the Comptroller of the amount of the increase in the capital stock of the bank, and that this amount has been actually paid in; and so long as the certificate remains unrevoked it may be taken to establish the amount of the capital stock of the bank. If the certificate happens for any reason to be false it is probable that an assessment may be laid upon the shareholders to make up the deficiency in the capital stock; but that the certificate of the Comptroller makes any one a shareholder who is not one or enables a bank to appropriate a debt it owes to a payment for stock, or to treat one of its creditors as a shareholder, is a proposition to which we cannot assent. The obligation of the plaintiff to take the new shares depends upon her contract with the bank. If we assume that immediately after the vote of December 13, 1881, the plaintiff could have treated the original vote as abandoned and could have demanded her money and brought and maintained an action to recover it the action of the directors and of the Comptroller in erroneously including the amount she had paid in the amount which had been paid in to increase the capital stock by $461,300 cannot affect her legal relations with the bank, unless she had assented to or ratified that action, or is estopped by her conduct or has been guilty of laches. As she demanded repayment, on January 10, 1882, of the money she had paid, she is not guilty of laches. It is not contended that there is any estoppel, and it is plain that there is no evidence of actual assent or ratification.

The defendant denies that it was the contract between it and the

plaintiff that she should receive forty shares out of five thousand shares of new stock, and says that the contract was that she should receive forty shares of new stock, and that there was no condition attached to the contract that the capital stock should be increased by $500,000. This objection is fundamental. The plaintiff did not subscribe for stock, but paid in her money in pursuance of the vote of September 13, 1881, and she took a receipt. There is no express condition, but, construing the receipt in connection with the vote, it is plain that she paid in her money for forty shares of the new stock voted on September 13.

In Warwick Railroad *v.* Cady, 11 R. I., 131, 137, it is said: "If the charter had provided for a definite capital, or if, by general law, provision had been made that the enterprise should not be commenced until some definite proportion or amount should be subscribed, * * * or if before subscription the capital had been fixed by vote or agreement, then it might well be held that the raising the whole amount was a condition of the subscription; and so, also, if the amount was named in the paper subscribed." This statement of the law is supported by our own decisions and by many others. Salem Mill-Dam Corporation *v.* Ropes, 6 Pick., 23, and 9 Pick., 187; Central Turnpike *v.* Valentine, 10 Pick., 142; Cabot & West Springfield Bridge *v.* Chapin, 6 Cush., 50; Atlantic Cotton Mills *v.* Abbott, 9 Cush., 423; People's Ferry Co. *v.* Balch, 8 Gray, 303; Troy & Greenfield Railroad *v.* Newton, 8 Gray, 596; Katama Land
16 Co. *v.* Jernegan, 126 Mass., 155; Read *v.* Memphis Gas Co., 9 Heisk., 545; Santa Cruz Railroad *v.* Schwartz, 53 Cal., 106; Hughes *v.* Antietam Manuf. Co., 34 Md., 316; Ridgefield & New York Railroad *v.* Brush, 43 Conn., 86; Ticonic Water-Power Co. *v.* Lang, 63 Maine, 480; Lewey's Island Railroad *v.* Bolton, 48 Maine, 451; Allman *v.* Havana, Rantoul & Eastern Railroad, 88 Ill., 521; Memphis Branch Railroad *v.* Sullivan, 57 Ga., 240; Peoria & Rock Island Railroad *v.* Preston, 35 Iowa, 115; Contoocook Valley Railroad *v.* Barker, 32 N. H., 363; Norwich & Lowestoft Nav. Co. *v.* Theobald, M. & M., 151; Pitchford *v.* Davis, 5 M. & W., 2; Peirce *v.* Jersey Water Works Co., L. R., 5 Ex., 309.

If, however, the amount of the capital stock is left indefinite or the maximum and minimum of the amount only are defined, with the right in the corporators or directors subsequently to determine the amount, a subscription to stock must be deemed absolute unless there is an express condition inserted in the subscription, or unless a sufficient amount is not subscribed to enable the corporation legally to organize. Penobscot & Kennebec Railroad *v.* Bartlett, 12 Gray, 244; Boston, Barre & Gardner Railroad *v.* Wellington, 113 Mass., 79; Boston & Albany Railroad *v.* Pearson, 128 Mass., 445.

A subscription to an increase of capital stock manifestly differs from a subscription to the original stock in this, that the subscriber is dealing with a corporation already organized and doing business, and it has been said that there is no implied condition that the whole number of the new shares created should be subscribed for or issued; but whether there is an implied condition attached to a subscription for new stock depends upon the contract of subscription,

construed with reference to the law and the facts under which it is made, and this is to be determined in the same manner and upon the same principles in subscriptions for new stock as in subscriptions for original stock. See Charleston *v.* People's National Bank, 5 S. Car., 103. In the common case of a corporation authorized to create new stock by a vote of its stockholders or directors the stock is created by the vote. In the absence of any statute prescribing how it shall be disposed of, it may be allotted among the stockholders or it may be sold from time to time as the corporation needs money. It may be sold by subscription and the stockholders may be entitled to a preference in subscribing, and they may sell their rights. If the law requires that the new stock be paid for at par before it is issued this must, of course, be done, but unless a statute or a by-law requires that the new stock shall all be subscribed for before it is created or issued there is no implied condition that all the stock created shall be subscribed for or issued. The increase of the capital stock is fixed by the vote, and the corporation is left to dispose of the new stock as it can according to law. Nutter *v.* Lexington & West Cambridge Railroad, 6 Gray, 85.

But in the case at bar the provisions of the statutes of the United States relating to an increase of the capital stock are even more strict than those relating to the original stock. An association may
17 be authorized to commence business when fifty per cent. of the capital stock has been paid in (U. S. Rev. Stats., sec. 5140), but there can be no increase in the capital stock until the whole amount of the increase has been paid in (sec. 5142). The vote of the directors of September 13, 1881, was, we think, in the nature of a proposal to the stockholders to subscribe for five thousand shares of new stock and to pay in for it $500,000. It was necessary that the stock should all be taken and the money all paid in before the new stock could be created. It was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the Comptroller should certify that they had been done and approved of the increase. We think that the plaintiff paid in her money upon the implied condition that she should not be entitled to new stock unless $500,000 was paid in and the Comptroller approved of the increase, and also upon the implied condition that she should not be required to take new stock unless the amount proposed was created.

The result is that the plaintiff is entitled to judgment for $4,000, with interest from January 10, 1882, the date of her demand. So ordered.

EXHIBIT C.

Writ of Error Proceedings.

The following is the application for the writ of error:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

MAY 11, 1887.

To the honorable the chief justice of the supreme judicial court:

Respectfully represents George M. Stearns, United States attorney for the district of Massachusetts, that at the request of the Secretary of the Treasury he has been directed by the Attorney General of the United States, by letter hereto annexed, to apply for a writ
18 of error from this court to the Supreme Court of the United States in the case of Mary J. Eaton *vs.* The Pacific National Bank, which has recently been decided in this court in favor of the plaintiff, in order that Peter Butler, Esq., receiver of said bank, may, under the provisions of section 1001 of the Revised Statutes of the United States, be relieved from the obligation of giving a bond of security on such appeal.

Wherefore he petitions that such writ of error be allowed as aforesaid; and will ever pray.

GEO. M. STEARNS,
U. S. Attorney,
By J. R. REED,
Ass't U. S. Att'y.

N. T. N. R. M. B. M.

In any further correspondence on this subject quote the above initials.

File No. 3291, '87.

DEPARTMENT OF JUSTICE,
WASHINGTON, *May* 4, 1887.

G. M. Stearns, Esq., United States attorney, Boston, Mass.

SIR: I transmit herewith a copy of a letter of the 2d instant, with its enclosure, from the Secretary of the Treasury, requesting that an appeal be taken by the Government to the United States supreme court of Massachusetts in the case of Mary J. Eaton *vs.* The Pacific National Bank of Boston.

You are instructed to carry out the wishes of the Secretary, first sending the transcript of appeal to the Department for examination.

Respectfully, A. H. GARLAND,
Attorney General.

Copy. M. B. M., J. W.

TREASURY DEPARTMENT, *May* 2, 1887.

The honorable the Attorney General.

SIR: I have the honor to enclose herewith copy of a letter, dated 28th ultimo, from the Comptroller of the Currency, requesting that, in order that the receiver of the Pacific National Bank of Boston may not be subjected to inconvenience in giving bond in an application for a writ of error to the Supreme Court of the United States in the case of Mary J. Eaton *vs.* The Pacific National Bank of Boston, decided in the supreme judicial court of Massachusetts in favor of the plaintiff, an appeal may be directed by this Department in the above-entitled cause, and to request that you cause the necessary action in the matter to be taken.

Respectfully yours, C. S. FAIRCHILD, *Secretary.*

19 TREASURY DEPARTMENT, OFFICE OF COMPTROLLER OF THE CURRENCY, WASHINGTON, *April* 28, 1887.

Hon. Hugh S. Thompson, Acting Secretary of the Treasury.

SIR: Upon the recommendation of Mr. Peter Butler, receiver of the Pacific National Bank of Boston, Mass., approved by me, it is desired to apply for and take a writ of error to the Supreme Court of the United States in the case of Mary J. Eaton *vs.* The Pacific National Bank of Boston, Mass., which has been decided in the supreme judicial court of the State of Massachusetts in favor of the plaintiff.

Section 1061 of the Revised Statutes of the United States provides that when an appeal is brought up to the Supreme Court by direction of any Department of the Government no bond, obligation, or security shall be required from any party acting under the direction aforesaid. Such an appeal has the effect of a supersedeas, and the receiver would be relieved from the obligation of giving a bond.

In order that Mr. Butler may not be subjected to inconvenience in giving bond, I respectfully request you to direct an appeal to be made in the above-entitled cause.

Very respectfully, W. L. TRENHOLM, *Comptroller.*

20 *Order of Court.*

NELSON, *J.:*

In pursuance of the foregoing agreement of the parties, and the same being according to the facts, it is hereby ordered by the court that the record in the said cause be rectified and amended in accordance with the same and in the particulars named therein. This order is entered June 8, 1888, as of October 7, 1887, before entry of judgment in said cause.

By the court:

JOHN G. STETSON, *Clerk.*

Answer to Declaration in Set-off.

The plaintiff in said action denies each and every allegation in the defendant's declaration in set-off contained the same as if specified and denied separately and in order.

By A. A. RANNEY, *His Att'y.*

It is agreed that the above answer may be filed as of May 31, 1887, and have effect the same as if actually filed on that day, and be certified up in amendment of and as a part of the record.

J. H. BENTON, JR., *For Def't.*

Order of Court.

NELSON, *J.*:

The foregoing agreement is allowed by the court, and it is
21 ordered that the above answer be filed as of May 31, 1887, and certified to the Supreme Court in amendment of and as a part of the record in said cause.

By the court:

JOHN G. STETSON, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

[Endorsed:] Supreme Court U. S. 1888, October term. No. 25. Peter Butler, rec'r, pl'ff in error, *vs.* Mary J. Eaton. Additional transcript of record.

[Stamped:] Office Supreme Court U. S. Filed Nov. 21, 1888. James H. McKenney, clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~425~~. 605 301

PETER BUTLER, RECEIVER, &c., PLAINTIFF IN ERROR,

vs.

MARY J. EATON.

ADDITIONAL TRANSCRIPT OF RECORD.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, NOVEMBER 30, 1888.

1 Circuit Court of the United States, District of Massachusetts.

PETER BUTLER, Receiver, Plaintiff,
v.
MARY J. EATON, Defendant. } No. 2033 (A), Law Docket.

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the following is a true copy of additional proceedings in said circuit court in the above-entitled cause, which, by agreements of the parties and orders of the court, are made a part of the record in said cause and are certified to the Supreme Court of the United States as an addition to the transcript of record annexed to the writ of error and return of the circuit court thereon in said cause, filed in said Supreme Court November 23, 1887.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this fifteenth day of November, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and thirteenth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

2 *Agreement of Parties.*

It is agreed that the record in said case may be amended and rectified as follows, to wit:

First. By striking out of the agreed facts this: "The annexed testimony of George L. Thayer is put into the case by the plaintiff" (original, page 23; print, page 18), and by inserting in place thereof the following, viz: "George L. Thayer was examined in the trial in the State court in the case of Thayer and another *vs.* Pacific National Bank, and his evidence as given there is hereto annexed and is to be taken and admitted in this court the same as though the defendant in this suit had called him as a witness and the examination and cross-examination had proceeded with the same questions and answers in this cause."

Second. By inserting therein the omitted portions of the proceedings of and in the State court, as admitted and used in evidence and named in the agreed facts, to wit: The report of the justice upon which the case of Mary J. Eaton *vs.* Pacific National Bank was heard and decided by the supreme judicial court of Massachusetts and the opinion of that court, together with the application of the receiver and all the papers filed with the proceedings in obtaining the writ of error, copies of each of which are hereto annexed—that is to say, copies hereto annexed marked, respectively, "Report, Exhibit A," "Opinion, Exhibit B," "Writ of error proceedings, Exhibit C."

A. A. RANNEY,
Att'y for Pl'ff.
J. H. BENTON, JR.,
For Def't.

3 EXHIBIT A.

Report.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss.*:

Supreme Judicial Court. April Sitting, 1886.

MARY J. EATON *v.* PACIFIC NATIONAL BANK.

The defendant is a national banking association organized under the laws of the United States by articles of association, a copy of which is hereto annexed, marked "Exhibit A," and by the adoption of by-laws, section eleven of which is as follows:

"Whenever an increase of stock shall be determined upon it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for in proportion to his existing stock in the bank. If any stockholder shall fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock."

On the 13th of September, 1881, the capital stock of the defendant was five hundred thousand dollars, of which the plaintiff
4 owned forty shares, which stood in her name on the books of the defendant, and for which she held a certificate, a copy of which is hereto annexed, marked "Exhibit B." On that day the directors of the defendant voted "that the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par to an equal amount to that now held by them," and the following notice of such increase was sent to and received by the plaintiff:

A. I. Benyon, president. J. M. Pettengill, cashier.

PACIFIC NATIONAL BANK, 105 DEVONSHIRE STREET,
BOSTON, *Sept.* 13, 1881.

"At a meeting of the directors of this bank held this day it was voted that the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them.

"Subscription to the new stock payable October 1st. Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

"J. M. PETTENGILL, *Cashier.*"

No subscription books were opened and the plaintiff did not subscribe for any stock in said increase of capital, but on the 28th of

September, 1881, she paid to the defendant four thousand dollars and received therefor the following receipt:

"Pacific National Bank.

"$4,000. SEP. 28.

"BOSTON, *October 1st*, 1881.

"Received of Mary J. Eaton four thousand dollars on account of subscription to new stock.

"J. M. PETTENGILL, *Cashier*."

The whole amount of increase of capital to one million dollars, being five hundred thousand dollars, was never paid in and no notice was ever transmitted to the Comptroller of the Currency that said additional five hundred thousand dollars had been paid in or that the whole amount of such proposed increase of the capital to one million dollars had been paid in, and the Comptroller never issued a certificate stating that the said capital stock had been increased to the amount of one million dollars, voted as above set forth, nor did he ever certify his approval of such increase or that it had been duly paid in as a part of the capital of said defendant, and no action was taken by him respecting any increase of stock from that of five hundred thousand dollars, except as hereinafter stated. Only four hundred and sixty-one thousand three hundred dollars of said proposed increase of five hundred thousand dollars was ever taken or paid in, all of which was paid in prior to November 18, 1881, and was used in the general business of the bank with its other funds. November 18, 1881, the defendant became unable to meet its debts and liabilities, suspended payment thereof, failed to redeem its circulating notes, and thereupon closed its doors to business.

Daniel Needham, a duly appointed examiner of national banks, having made an examination of said bank and having reported its condition to the Comptroller of the Currency, was on said eighteenth day of November, 1881, placed in charge and possession of said bank and all its funds, assets, records, and books by said Comptroller. Said bank remained under the exclusive charge and in the possession of said Needham, with its doors closed to business, until on or about March 18, 1882, the directors thereof having in the meantime no possession or control over the assets of said bank or the moneys received or paid out on account of the bank, except under the supervision, control, and authority of said examiner.

December 13, 1881, the directors of the defendant passed the following vote:

"Voted, That whereas it was voted by this board on the thirteenth day of September last that the capital of this bank be increased to one million dollars and that the stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

"And whereas the stockholders were duly notified of said vote,

and also that subscriptions to the new stock should be payable October 1st;

"And whereas $461,300 of said new stock has been taken and paid in;

"And whereas $38,700 thereof has not been taken and paid in:

"Voted, That said $38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

"Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase, according to law."

On the same day the cashier of the defendant, by direction of the directors and upon suggestion of the Comptroller that such a certificate should be sent to him, sent the following certificate, duly sworn to by the cashier, to the Comptroller of the Currency, together with a copy of the foregoing vote:

"Pacific National Bank of Boston.

"DECEMBER 13, 1881.

"To the Comptroller of the Currency, Washington, D. C.:

"It is hereby certified that the capital stock of the Pacific National Bank of Boston has been increased, pursuant to the articles of association of said bank, in the sum of four hundred and sixty-
6 one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred sixty-one thousand three hundred dollars.

"[SEAL.] J. M. PETTENGILL, *Cashier.*"

On receipt of said certificate and copy the Comptroller of the Currency sent to the directors of the defendant the following certificate:

"TREASURY DEPARTMENT,
"OFFICE OF THE COMPTROLLER OF THE CURRENCY,
"WASHINGTON, *Dec.* 16, 1881.

"Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of 'The Pacific National Bank of Boston, Mass.,' has been increased to the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with its articles of association, and that the whole amount of such increase has been paid in: Now, it is hereby certified that the capital stock of 'The Pacific National Bank of Boston, Mass.,' aforesaid has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid in to said bank as a part of the capital thereof, and that the said increase of capital stock is approved by the Comptroller of the Currency.

"In witness whereof I hereunto affix my official signature.

"[SEAL.] JOHN J. KNOX,
"*Comptroller.*"

There was no vote of the stockholders of the defendant relating to the increase or reduction of its capital stock.

On the 16th of December the Comptroller sent to the defendant the following communication:

"WASHINGTON, *Dec.* 16, 1881.

"To the Pacific National Bank of Boston, Massachusetts:

"The entire capital stock of The Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred dollars ($961,300), having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred per cent. upon its stockholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid and said bank shall refuse to go into liquidation as provided by law for three months after this notice shall have been received by it a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of the Revised Statutes of the United States.

"In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

"[SEAL.] JOHN JAY KNOX,

"*Comptroller of the Currency.*"

7 No certificate of stock in said proposed increase of capital in the amount of five hundred thousand dollars was made by the bank nor was any certificate in said claimed increase of four hundred and sixty-one thousand three hundred dollars received by or offered to the plaintiff; but when the certificate from the Comptroller, made December 16, was received by the bank a certificate of forty shares in said claimed increase of four hundred and sixty-one thousand three hundred dollars was made by the bank, a copy of which is hereto annexed, marked C, which was never called for, taken by, or tendered to the plaintiff, but still remains in the certificate book, and she was then registered in the stock register of the bank as the owner thereof without her knowledge. No certificates in said claimed increase *was* ever tendered by the bank to any persons to whom they were made, but were delivered to them when called for. No communication was made to the plaintiff with reference to said vote of the directors of December 13, or change in said proposed increase, or said certificate of said Comptroller, or said certificate made to her, and she never assented to any change in the proposed increase in the sum of $500,000.

On the tenth of January, 1882, before the opening of the annual meeting, hereinafter referred to, she made the following demand upon the defendant in writing, delivered to its directors:

"BOSTON, *January* 10, 1882.

"To the Pacific National Bank:

"The conditions upon which you received four thousand dollars of me on the twenty-eighth day of September, 1881, not having been performed, I hereby demand repayment of said four thousand dollars.

"MARY J. EATON,
"By J. H. BENTON, JR., *Att'y.*"

On December 10, 1881, the directors voted to call the annual meeting of the stockholders to be held on January 10, 1882, and thereupon the following notice was sent to and received by plaintiff, viz:

"Pacific National Bank.

"The annual meeting of the stockholders of this bank, for the choice of directors and for any other business that may legally come before them, will be held at their banking-room, 105 Devonshire street, on Tuesday, January 10, 1882, at 11 o'clock a. m.

"J. M. PETTENGILL, *Cashier.*"

This notice was also printed in the new-papers then published in Boston. At this meeting the said examiner made a report of the condition of the bank, and, among other things, the following vote was passed, viz:

"Voted, In accordance with the notice of the Comptroller of the Currency dated December 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent. upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata*, for the amount of capital stock of said bank held by each shareholder.

"Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith."

The whole number of votes cast being 5,549, representing 5,549 shares of stock, of which 5,494 were in the affirmative and 55 in the negative.

The plaintiff attended said meeting by her authorized attorney under the following proxy, which was not filed with the bank and on which no vote was cast.

"Know all men by these presents that I, the undersigned, stockholder in the Pacific National Bank, do hereby appoint J. H. Benton, Jr., true and lawful attorney, with power of substitution for myself and in my name, to vote at the meeting of the stockholders in said company, upon my forty shares of said stock, to be held at Boston, January 10, or at any adjournment thereof, with all the powers I should possess if personally present, hereby revoking all previous proxies; and this proxy does not apply to anything but my forty shares of the original stock of said bank.

"MARY J. EATON.

"Witness:
"GEORGE L. THAYER."

Notice of said assessment and vote was forthwith given to plaintiff by said bank, but she never paid any part thereof.

The total amount paid in to said directors by the stockholders on the assessment agreed upon at said meeting, January 10, 1882, was $742,800, and was all paid in prior to May 20, 1882.

On the fourteenth day of March, 1882, the plaintiff brought this suit to recover said four thousand dollars.

March 18, 1882, by permission of the Comptroller of the Currency, the directors took possession of the assets of said bank, opened its doors to business, and continued to do a general banking business, loaning money, receiving and paying deposits, and paying debts and expenses, until the twentieth day of May, 1882, but made no losses or new loans during that period. The bank was closed to business on said May 20, 1882, and the directors voted to go into liquidation; and thereupon Linus M. Price was appointed receiver thereof by the Comptroller of the Currency, and continued in charge of said bank and its assets, books, papers, and records until March 18, 1886, when Peter Butler was appointed by said Comptroller receiver thereof in place of said Price, and said Butler has ever since been in charge of said bank, its assets, books, papers, and records.

The only authority of the bank to increase or reduce its capital was under its articles of association and the by-law hereinbefore set forth and sections 5142 and 5143 of the Revised Statutes of the United States, which were as follows:

"Any association formed under this title may, by its articles of association, provide for an increase of its capital from time
9 to time as may be deemed expedient, subject to the limitations of this title; but the maximum of such increase to be provided in the articles of association shall be determined by the Comptroller of the Currency, and no increase of capital shall be valid until the whole amount of such increase is paid in and notice thereof has been transmitted to the Comptroller of the Currency and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association.

"Any association formed under this title may, by the vote of shareholders owning two-thirds of its capital stock, reduce its capital to any sum not below the amount required by this title to authorize the formation of such associations, but no reduction shall be allowable which will reduce the capital of the association below the amount required for its outstanding circulation, nor shall any such reduction be made until the amount of the proposed reduction has been reported to the Comptroller of the Currency and his approval thereof obtained."

Any other statute laws of the United States may be considered proved as facts and referred to by either party.

Upon the trial before me I found the foregoing facts, subject to any objection by either party as to their materiality or competency, and, at the request of the parties, reserve the case for the consideration of the full court.

WILLIAM ALLEN, *J. S. J. C.*

EXHIBIT A.

Articles of Association.

For the purpose of organizing an association to carry on the business of banking under the sections of the Revised Statutes which authorize the organization of national banking associations, approved June 22d, 1874, and of subsequent acts in addition to or amendatory thereof, the undersigned, subscribers for the stock of said association, do enter into the following articles of association:

First. The name and title of this association shall be "The Pacific National Bank of Boston."

Second. The place where its banking-house or office shall be located and its operations of discount and deposit carried on and its general business conducted shall be in the city of Boston, county of Suffolk, and State of Massachusetts.

Third. The board of directors shall consist of from five to twelve stockholders, and the following persons, Leonard Whitney, Jr., Gideon P. Brown, Marcellus P. Springer, John H. Sanborn, Edward C. Huxley, Moses B. Tower, Edwin Ray, Edwin M. Fowle, J. Henry Whittaker, Arthur Sewall, George C. Rand, and Abner I. Benyon, are hereby appointed directors of this association, to hold their offices as such until the regular annual election takes place, pursuant to the fourth article of these articles of association, and until their successors are chosen and qualified.

Fourth. The regular annual meetings of the stockholders for the election of directors shall be held at the banking-house of this association on the second Tuesday of January of each year; but if no election shall be held on that day it may be held on any other day, according to the provisions of section 5149 of the Revised Statutes, and all elections shall be held according to such regulations as may be prescribed by the board of directors not inconsistent with the aforesaid provisions of the said 5149 section of the Revised Statutes.

Fifth. The capital stock of this association shall be two hundred and fifty thousand dollars, to be divided into shares of one hundred dollars each, but the capital may be increased, according to the provisions of section 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars; and in the case of the increase of capital of the association each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold this office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director, and they shall have power to elect a vice-president, who shall also be a member of the board of *electors*, and to elect or ap-

point a cashier and such other officers and clerks as may be required to transact the business of the association, to fix the salaries to be paid to them and continue them in office, or dismiss them, as, in the opinion of a majority of the board, the interests of the association may demand. They shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make, under said Revised Statutes, for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of stock owned by any stockholder who may be liable to this association, either as principal, debtor, or otherwise, without the consent of the board.

Seventh. This association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements, and provisions of the Revised Statutes.

Eighth. These articles of the association may be changed or amended at any time by stockholders owning a majority of the stock of the association in any manner not inconsistent with the Revised Statutes, and the board of directors or any three stockholders may call a meeting of the stockholders for this purpose.

In witness whereof we have hereunto set our hands this tenth day of October, eighteen hundred and seventy-seven.

LEONARD WHITNEY, JR.
GIDEON P. BROWN.
MARCELLUS P. SPRINGER.
JOHN H. SANBORN.
EDWARD C. HUXLEY.
MOSES B. TOWER.
EDWIN RAY.
EDWIN M. FOWLE.
JAMES H. WHITAKER.
GEORGE C. RAND.
ARTHUR SEWALL.
ABNER I. BENYON.

EXHIBIT B.

Opinion.

COMMONWEALTH OF MASSACHUSETTS:

BOSTON, *June* 14, 1887.

I certify the annexed to be a true copy of the opinion of the supreme judicial court in the case of Mary J. Eaton *vs.* Pacific National Bank, decided on the twenty-third day of March, 1887.

JOHN LATHROP,
Reporter of Decisions.

The following is the opinion of the supreme judicial court for the Commonwealth:

FIELD, *J.*:

When this action was brought the bank was not in the hands of a receiver, and the receiver afterwards appointed has not formally intervened or appeared, but it was understood at the argument that the action was defended by him, and that he desired that it should be prosecuted for the purpose of determining the liability of the bank. See Bethel Bank *v.* Pahquioque Bank, 14 Wall., 383.

12 The case was reserved for the consideration of the full court, presumably under the Pub. Sts., c. 150, § 8. The facts have been found, and, although the questions of law have not been stated in the report, it is plainly the intention of the report to reserve the question of law whether, on the facts found or such of them as are competent, judgment should be entered for the plaintiff or for the defendant. We are of opinion that the reservation is within the power conferred by this section of the statutes, and we consider the case as if it were reserved for judgment upon the facts found, which are in the nature of a special verdict. See Terry *v.* Brightman, 129 Mass., 535.

By the articles of association of the bank "the capital may be increased, according to the provisions of § 5142 of the Revised Statutes, to any sum not exceeding ten hundred thousand dollars," and the board of directors shall have power "to provide for an increase of the capital of the association and to regulate the manner in which such increase shall be made." The vote of the directors of September 13, 1881, to increase the capital stock to $1,000,000, which was an increase of $500,000, and the subsequent vote of December 13, 1881, to increase the capital stock by $451,300, instead of $500,000, were therefore both within the power of the board.

The case raises a question which was suggested, but not decided, in Delano *v.* Butler, 118 U. S., 634. It was there said: "It will be observed that, without waiting to see what the future action of the association and the Comptroller of the Currency might be on the question of the ultimate amount of the increased stock, the plaintiff in error paid for his shares and accepted his certificate. This he

did, in legal contemplation, with knowledge of the law which authorized the association and the Comptroller of the Currency to reduce the amount of the proposed increase to a less sum than that fixed in the original proposal of the directors, and such payment and acceptance of the certificates in accordance therewith might amount, under such circumstances, on his part, to a waiver of the right to insist that he should not be bound unless the whole amount of the proposed increase should be subscribed for and paid in, but without insisting upon that point or deciding it we think that the subsequent conduct of the plaintiff in error amounts to a ratification." 118 U. S., 650.

In the present case the plaintiff paid in her money, but did not accept a certificate of stock.

To make the increase of the capital stock valid it must be authorized in accordance with the articles of the association. The whole amount of it must be paid in. Notice thereof must be transmitted to the Comptroller, and he must certify "that it has been duly paid in as part of the capital of such association," and must approve of it. U. S. Rev. Sts., § 5142. The plaintiff, therefore, was compelled to pay in her money before the final action of the Comptroller in order to become entitled to any part of the new stock. Within the maximum of the increase of capital stock provided for by the articles of association the Comptroller could not determine the amount of the increase, except by approving or refusing to approve the
13 amount authorized by and paid into the bank. The united action of the bank or its directors, of the subscribers to the new stock, and of the Comptroller was required to effect an increase of the capital stock; and when the plaintiff paid in her money she ran the risk that the contemplated increase of $500,000 might fail, either because it might not all be subscribed for and paid or because the Comptroller might refuse his approval; but she did not run the risk that if it were all paid in the Comptroller might, without any further action of the bank or its directors, reduce the amount of the increase, because he had not the lawful power to do this. If the Comptroller refused his approval the plan failed. The directors by a new vote might authorize another and a different increase of the capital stock, which, if the amount was paid in and the Comptroller approved of it, would become an actual increase of capital stock; but this would be an abandonment of the first plan by the bank and the adoption of another.

Upon the ordinary principles of contract, if the plaintiff paid in her money for forty shares of stock on the condition that five thousand shares of stock should be created, she could not be bound to take the forty shares if the condition was not performed. If there was such a condition the plaintiff could not be required to take forty shares out of four thousand six hundred and thirteen shares, which the bank by a subsequent vote authorized, unless there is something in the facts which shows that the amount of stock to be created was immaterial, or unless she assented to the change or her assent is to be implied, or unless, on grounds of public policy and the rights of creditors, she cannot be permitted to withdraw her

money after the Comptroller has certified that a certain amount has been paid in as an increase of the capital stock, which amount includes the sum she has paid.

Whether the plaintiff shall become the owner of forty out of five thousand shares of capital stock or the owner of forty out of four thousand one hundred and sixty-three shares cannot be regarded as immaterial, particularly in a corporation where the stockholders are liable to an assessment to the amount of the stock held by each to supply a deficiency in the capital stock (U. S. Rev. Sts., § 5205), and are also held "individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." U. S. Rev. Sts., § 5151.

Neither can we perceive any sound reason why, in legal contemplation, she must be held to have assented to the change whereby the amount of the contemplated increase was reduced to $461,300. She paid in her money under a vote whereby the capital stock was to be increased by $500,000. If this amount was not paid in or the Comptroller did not approve of this increase there was an end of the proposition which had been voted and which she and the bank had in contemplation when she paid in her money. If the directors of the bank, after she paid in her money, abandoned their original vote and passed another vote for an increase different in
14 amount, it is difficult to see how she was bound by it. They were not her agents; the new vote was not passed in furtherance of the original proposition to make the increase $500,000; the vote was not a reduction of the capital stock of the bank, because the increase had not then been made, and the capital stock of a banking association can only be reduced by a vote of the shareholders. U. S. Rev. Sts., § 5143. To make the increase of the capital stock $461,300 instead of $500,000 was essentially a new proposition, authorized for the first time on December 13, 1881, nearly two months and a half after the plaintiff paid in her money.

On the facts found the intention of the directors and of the Comptroller is apparent. The bank failed on November 18, 1881, and, before this, $461,300 had been paid into the bank for new stock, to be created under the vote passed on September 13, 1881. It was not likely that any more money would be paid in for this purpose after the failure of the bank. The bank had received this money, and had used and lost it. On its failure a bank examiner took possession of the bank and its assets and remained in possession until March 18, 1882. While its assets were in the possession of the bank examiner it was decided to make this $461,300 a part of the capital stock of the bank; it would then cease to be a debt of the bank, and the creditors of this sum, having thus been made stockholders, would then be liable to an assessment to an equal amount to supply the deficiency of capital stock, and would also be liable to pay another equal amount to satisfy the debts of the bank. The directors accordingly passed the vote of December 13, 1881, which in form is a reduction of the capital stock by the sum of $38,700, but in fact is a

vote authorizing the increase of the capital stock by $461,300; and they attempted to apply the money paid in under the previous vote to this new increase which they had voted, and then voted that the Comptroller of the Currency be notified that the capital had been increased by this sum, and that the whole amount had been paid in, and they requested the Comptroller to issue his certificate. The cashier on the same day sent to the Comptroller a copy of the foregoing votes and his certificate that the capital had been increased by the sum of $461,300, all of which had been paid in. The copy of the votes sent to the Comptroller informed him that the attempt to obtain $500,000 for an increase of the capital stock had failed, and because it had failed that the directors had fixed the amount of the increase at $461,300 and had declared the money paid in under the previous vote as paid in for the new stock voted on December 13. The Comptroller of the Currency, on December 16, 1881, issued the usual certificate approving of "said increase of capital stock" to the amount of $461,300, and on the same day sent to the bank a notice that its entire capital stock, including the increase he had just then approved, having been lost an assessment of one hundred per cent. must be laid upon the shareholders; otherwise the bank must go into liquidation or a receiver must be appointed, according to U. S. Rev. Sts., § 5234.

It is argued that the certificate of the Comptroller is conclusive on the plaintiff that the sum of $461,300 was actually paid in as
15 an increase of capital stock, and that this includes the amount which she paid. Undoubtedly the public in dealing with a bank do rely to some extent upon the certificate by the Comptroller of the amount of the increase in the capital stock of the bank, and that this amount has been actually paid in; and so long as the certificate remains unrevoked it may be taken to establish the amount of the capital stock of the bank. If the certificate happens for any reason to be false it is probable that an assessment may be laid upon the shareholders to make up the deficiency in the capital stock; but that the certificate of the Comptroller makes any one a shareholder who is not one or enables a bank to appropriate a debt it owes to a payment for stock, or to treat one of its creditors as a shareholder, is a proposition to which we cannot assent. The obligation of the plaintiff to take the new shares depends upon her contract with the bank. If we assume that immediately after the vote of December 13, 1881, the plaintiff could have treated the original vote as abandoned and could have demanded her money and brought and maintained an action to recover it the action of the directors and of the Comptroller in erroneously including the amount she had paid in the amount which had been paid in to increase the capital stock by $461,300 cannot affect her legal relations with the bank, unless she had assented to or ratified that action, or is estopped by her conduct or has been guilty of laches. As she demanded repayment, on January 10, 1882, of the money she had paid, she is not guilty of laches. It is not contended that there is any estoppel, and it is plain that there is no evidence of actual assent or ratification.

The defendant denies that it was the contract between it and the

plaintiff that she should receive forty shares out of five thousand shares of new stock, and says that the contract was that she should receive forty shares of new stock, and that there was no condition attached to the contract that the capital stock should be increased by $500,000. This objection is fundamental. The plaintiff did not subscribe for stock, but paid in her money in pursuance of the vote of September 13, 1881, and she took a receipt. There is no express condition, but, construing the receipt in connection with the vote, it is plain that she paid in her money for forty shares of the new stock voted on September 13.

In Warwick Railroad *v.* Cady, 11 R. I., 131, 137, it is said: "If the charter had provided for a definite capital, or if, by general law, provision had been made that the enterprise should not be commenced until some definite proportion or amount should be subscribed, * * * or if before subscription the capital had been fixed by vote or agreement, then it might well be held that the raising the whole amount was a condition of the subscription; and so, also, if the amount was named in the paper subscribed." This statement of the law is supported by our own decisions and by many others. Salem Mill-Dam Corporation *v.* Ropes, 6 Pick., 23, and 9 Pick., 187; Central Turnpike *v.* Valentine, 10 Pick., 142; Cabot & West Springfield Bridge *v.* Chapin, 6 Cush., 50; Atlantic Cotton Mills *v.* Abbott, 9 Cush., 423; People's Ferry Co. *v.* Balch, 8 Gray, 303; Troy & Greenfield Railroad *v.* Newton, 8 Gray, 596; Katama Land
16 Co. *v.* Jernegan, 126 Mass., 155; Read *v.* Memphis Gas Co., 9 Heisk., 545; Santa Cruz Railroad *v.* Schwartz, 53 Cal., 106; Hughes *v.* Antietam Manuf. Co., 34 Md., 316; Ridgefield & New York Railroad *v.* Brush, 43 Conn., 86; Ticonic Water-Power Co. *v.* Lang, 63 Maine, 480; Lewey's Island Railroad *v.* Bolton, 48 Maine, 451; Allman *v.* Havana, Rantoul & Eastern Railroad, 88 Ill., 521; Memphis Branch Railroad *v.* Sullivan, 57 Ga., 240; Peoria & Rock Island Railroad *v.* Preston, 35 Iowa, 115; Contoocook Valley Railroad *v.* Barker, 32 N. H., 363; Norwich & Lowestoft Nav. Co. *v.* Theobald, M. & M., 151; Pitchford *v.* Davis, 5 M. & W., 2; Peirce *v.* Jersey Water Works Co., L. R., 5 Ex., 309.

If, however, the amount of the capital stock is left indefinite or the maximum and minimum of the amount only are defined, with the right in the corporators or directors subsequently to determine the amount, a subscription to stock must be deemed absolute unless there is an express condition inserted in the subscription, or unless a sufficient amount is not subscribed to enable the corporation legally to organize. Penobscot & Kennebec Railroad *v.* Bartlett, 12 Gray, 244; Boston, Barre & Gardner Railroad *v.* Wellington, 113 Mass., 79; Boston & Albany Railroad *v.* Pearson, 128 Mass., 445.

A subscription to an increase of capital stock manifestly differs from a subscription to the original stock in this, that the subscriber is dealing with a corporation already organized and doing business, and it has been said that there is no implied condition that the whole number of the new shares created should be subscribed for or issued; but whether there is an implied condition attached to a subscription for new stock depends upon the contract of subscription,

construed with reference to the law and the facts under which it is made, and this is to be determined in the same manner and upon the same principles in subscriptions for new stock as in subscriptions for original stock. See Charleston *v.* People's National Bank, 5 S. Car., 103. In the common case of a corporation authorized to create new stock by a vote of its stockholders or directors the stock is created by the vote. In the absence of any statute prescribing how it shall be disposed of, it may be allotted among the stockholders or it may be sold from time to time as the corporation needs money. It may be sold by subscription and the stockholders may be entitled to a preference in subscribing, and they may sell their rights. If the law requires that the new stock be paid for at par before it is issued this must, of course, be done, but unless a statute or a by-law requires that the new stock shall all be subscribed for before it is created or issued there is no implied condition that all the stock created shall be subscribed for or issued. The increase of the capital stock is fixed by the vote, and the corporation is left to dispose of the new stock as it can according to law. Nutter *v.* Lexington & West Cambridge Railroad, 6 Gray, 85.

But in the case at bar the provisions of the statutes of the United States relating to an increase of the capital stock are even more strict than those relating to the original stock. An association may
17 be authorized to commence business when fifty per cent. of the capital stock has been paid in (U. S. Rev. Stats., sec. 5140), but there can be no increase in the capital stock until the whole amount of the increase has been paid in (sec. 5142). The vote of the directors of September 13, 1881, was, we think, in the nature of a proposal to the stockholders to subscribe for five thousand shares of new stock and to pay in for it $500,000. It was necessary that the stock should all be taken and the money all paid in before the new stock could be created. It was a condition precedent to the issue of the new stock under this vote that both these things should be done, and that the Comptroller should certify that they had been done and approved of the increase. We think that the plaintiff paid in her money upon the implied condition that she should not be entitled to new stock unless $500,000 was paid in and the Comptroller approved of the increase, and also upon the implied condition that she should not be required to take new stock unless the amount proposed was created.

The result is that the plaintiff is entitled to judgment for $4,000, with interest from January 10, 1882, the date of her demand. So ordered.

EXHIBIT C.

Writ of Error Proceedings.

The following is the application for the writ of error:

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss:*

MAY 11, 1887.

To the honorable the chief justice of the supreme judicial court:

Respectfully represents George M. Stearns, United States attorney for the district of Massachusetts, that at the request of the Secretary of the Treasury he has been directed by the Attorney General of the United States, by letter hereto annexed, to apply for a writ
18 of error from this court to the Supreme Court of the United States in the case of Mary J. Eaton *vs.* The Pacific National Bank, which has recently been decided in this court in favor of the plaintiff, in order that Peter Butler, Esq., receiver of said bank, may, under the provisions of section 1001 of the Revised Statutes of the United States, be relieved from the obligation of giving a bond of security on such appeal.

Wherefore he petitions that such writ of error be allowed as aforesaid; and will ever pray.

GEO. M. STEARNS,
U. S. Attorney,
By J. R. REED,
Ass't U. S. Att'y.

N. T. N. R. M. B. M.

In any further correspondence on this subject quote the above initials.

File No. 3291, '87.

DEPARTMENT OF JUSTICE,
WASHINGTON, *May* 4, 1887.

G. M. Stearns, Esq., United States attorney, Boston, Mass.

SIR: I transmit herewith a copy of a letter of the 2d instant, with its enclosure, from the Secretary of the Treasury, requesting that an appeal be taken by the Government to the United States supreme court of Massachusetts in the case of Mary J. Eaton *vs.* The Pacific National Bank of Boston.

You are instructed to carry out the wishes of the Secretary, first sending the transcript of appeal to the Department for examination.

Respectfully. A. H. GARLAND,
Attorney General.

Copy. M. B. M., J. W.

TREASURY DEPARTMENT, *May* 2, 1887.

The honorable the Attorney General.

SIR: I have the honor to enclose herewith copy of a letter, dated 28th ultimo, from the Comptroller of the Currency, requesting that, in order that the receiver of the Pacific National Bank of Boston may not be subjected to inconvenience in giving bond in an application for a writ of error to the Supreme Court of the United States in the case of Mary J. Eaton *vs.* The Pacific National Bank of Boston, decided in the supreme judicial court of Massachusetts in favor of the plaintiff, an appeal may be directed by this Department in the above-entitled cause, and to request that you cause the necessary action in the matter to be taken.

Respectfully yours, C. S. FAIRCHILD, *Secretary.*

19 TREASURY DEPARTMENT, OFFICE OF COMPTROLLER OF THE CURRENCY, WASHINGTON, *April* 28, 1887.

Hon. Hugh S. Thompson, Acting Secretary of the Treasury.

SIR: Upon the recommendation of Mr. Peter Butler, receiver of the Pacific National Bank of Boston, Mass., approved by me, it is desired to apply for and take a writ of error to the Supreme Court of the United States in the case of Mary J. Eaton *vs.* The Pacific National Bank of Boston, Mass., which has been decided in the supreme judicial court of the State of Massachusetts in favor of the plaintiff.

Section 1001 of the Revised Statutes of the United States provides that when an appeal is brought up to the Supreme Court by direction of any Department of the Government no bond, obligation, or security shall be required from any party acting under the direction aforesaid. Such an appeal has the effect of a supersedeas, and the receiver would be relieved from the obligation of giving a bond.

In order that Mr. Butler may not be subjected to inconvenience in giving bond, I respectfully request you to direct an appeal to be made in the above-entitled cause.

Very respectfully, W. L. TRENHOLM, *Comptroller.*

20 *Order of Court.*

NELSON, *J.:*

In pursuance of the foregoing agreement of the parties, and the same being according to the facts, it is hereby ordered by the court that the record in the said cause be rectified and amended in accordance with the same and in the particulars named therein. This order is entered June 8, 1888, as of October 7, 1887, before entry of judgment in said cause.

By the court:

JOHN G. STETSON, *Clerk.*

Answer to Declaration in Set-off.

The plaintiff in said action denies each and every allegation in the defendant's declaration in set-off contained the same as if specified and denied separately and in order.

By A. A. RANNEY, *His Att'y.*

It is agreed that the above answer may be filed as of May 31, 1887, and have effect the same as if actually filed on that day, and be certified up in amendment of and as a part of the record.

J. H. BENTON, JR., *For Def't.*

Order of Court.

NELSON, *J.*:

The foregoing agreement is allowed by the court, and it is
21 ordered that the above answer be filed as of May 31, 1887, and certified to the Supreme Court in amendment of and as a part of the record in said cause.

By the court:

JOHN G. STETSON, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

[Endorsed:] Supreme Court U. S. 1888, October term. No. 25. Peter Butler, rec'r, pl'ff in error, *vs.* Mary J. Eaton. Additional transcript of record.

[Stamped:] Office Supreme Court U. S. Filed Nov. 21, 1888. James H. McKenney, clerk.

Office Supreme Court U. S.
FILED,
FEB 18 1921
JAMES H. McKENNA,

Supreme Court of the United States.

No 301.

PETER BUTLER, *Receiver in Error*,

v.

MARY J. EATON.

ADDENDA TO PLAINTIFF'S BRIEF.

Since the brief in said case was drawn and printed, this Court has decided the case of Aspinwall *v.* Butler, 133 U. S. 595, affirming the case of Delano *v.* Butler, 118 U. S. 634. This establishes conclusively that the State Court erred in disregarding the doctrine of the latter case instead of treating it as of paramount authority.

The Circuit Court also erred in finding an estoppel in the State Court decision, as against his own opinion adversely to that decision, the adjudication of this Court in the Delano case being paramount as an authority. (Exception, Rec., page 56.)

The ruling was erroneous in that the estoppel was found in disregard of and in spite of the additional issues raised in the circuit court case on the answer and the evidence of Mr. Thayer in connection with the other facts agreed and not embraced in the issues adjudged in the court case, showing a waiver, acquiescence, and an estoppel as against the

creditors. The Court made the judgment of the State court conclusive as *res adjudicata* upon an issue raised in the circuit court case and not raised on the report of facts in the State court case. (Rec., page 56, amendment of same.)

While it is true that this case is presented on the rulings of the Court stated in the bill of exceptions (Rec., page 56), yet the two cases are before the Court at the same time for adjudication, and therefore within the power of this Court. We submit that it is competent for this Court, when the judgment of the State court which constitutes the estoppel as held is reversed, to administer the remedy by its mandate to the court below, instead of leaving the receiver to pursue the same by means of a writ of *audita querela*.

The matter lies in the power and discretion of this Court. This Court can enter final judgment here in the State court case, and that conclusively disposes of the estoppel.

Inasmuch as the writ of error to the State court was pending when the circuit court case was adjudged, the matter was still *sub judice*, and the ruling in theory of law was only conditional at best.

In U. S. *v.* Schooner Peggy, 1 Cranch, 107, this Court gave effect to a treaty negotiated while the writ of error was pending, and not appearing in the record, as against the decree of condemnation made in the court below. In that case the Court say: "In such a case the Court must decide according to existing laws, and if it be necessary to set aside a judgment rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

In Railroad Company *v.* Twombly, 100 U. S. 81, the Court only made a reasonable exercise of its discretion, in

preventing a writ of error wrongfully taken, because not allowable, from prejudicing the defendant in error, by reason of the intermediate repeal of the statute on which the action alone rested.

In the State court case of Goodrich *v.* Wilson, 135 Mass. 31, all the Court decided was, that the plaintiff in error, who had obtained his certificate of discharge in bankruptcy proceedings, instituted during the pendency of the writ of error, should not be allowed to avail himself of the same on a mere motion against the State Court obeying the mandate of this Court, affirming the judgment of the Court below, and directing an entry accordingly. The party had neglected to avail himself of the bankruptcy proceedings and the discharge at the proper time and in the proper way, and he was left to his remedy by writ of *audita querela*, if he had any.

The two cases before the Court are to be treated and dealt with together, although standing on separate records. It would be idle for this Court to affirm the judgment below, and to require the receiver to resort to a writ of *audita querela*, to get his remedy against the same, when the right is fully adjudged.

We submit that this Court upon the agreed facts and evidence, should by its mandate, direct the judgment below to be changed by doubling the amount thereof with interest.

A. A. RANNEY,

For the Receiver.

Office Supreme Court U. S.
FILED.
JUL 29 1890
JAMES. H. McKENNEY.
CLERK.

Supreme Court of the United States.

Pacific National Bank

No. 239 PETER BUTLER, RECEIVER IN ERROR, *vs.* MARY J. EATON.

No. 240 SAME *vs.* SAME.

No. 241 GEORGE L. THAYER, TRUSTEE IN ERROR, *vs.* PETER BUTLER, RECEIVER.

MOTION OF PETER BUTLER, THAT THE CASES BE ARGUED TOGETHER.

The said Peter Butler, plaintiff in error in two cases and defendant in error in one case, respectfully represents that said cases depend for their determination upon the same state of facts substantially, and upon the same general questions of law, with the exception that there is in the second one named a subordinate additional question, arising out of an alleged estoppel as *res adjudicata*, because of a judgment by the State Court in the first case named above. The general facts are the same, so far as deemed material, as those in Delano *v.* Butler, 118 U. S. 634, and Aspinwall *v.* Butler, 133 U. S. 595.

The first case is a writ of error, to the State Court, for the review of a judgment, to the effect that Mrs. Eaton was entitled to recover the money paid for forty shares of new stock, because the increased capital stock was made $462,300 instead of $500,000, as first voted by the directors. The second suit was brought in the Federal Court for the purposes of enforcing her individual liability on account of the same, together with forty shares of the old stock. The court below held the said judgment of the State Court to be a bar to the recovery so far as the new stock was concerned. The third case is an exact duplicate of the second, exclusive of the said question of estoppel. The same counsel appear in each case.

The main question to be argued, common to all the cases, is whether the increased capital stock as effected was legal and valid,

and the respective parties paying the money become the owners of the shares paid for and issued to them; with the further said question of estoppel as applicable alone to one of the cases.

The said Butler, therefore, applies and respectfully moves that the last two cases be argued and heard with the first one named, when it is reached in order.

PETER BUTLER, Receiver
By his Attorney,
A. A. RANNEY.

Personally appeared Peter Butler, receiver, and made oath to the truth of the facts stated in the foregoing petition or motion.

Before me,

[SEAL.] ISAIAH R. CLARK,
Notary Public.

I, A. A. Ranney, counsel for the said receiver, Butler, hereby certify that the facts stated in the foregoing petition or motion are true.

A. A. RANNEY.

Office Supreme Court U. S.
FILED
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 301.

PETER BUTLER,

RECEIVER OF THE PACIFIC NATIONAL BANK,

PLAINTIFF IN ERROR,

v.

MARY J. EATON.

BRIEF FOR DEFENDANT.

J. H. BENTON, JR.,
Counsel for Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 301.

PETER BUTLER, *Receiver of the Pacific National Bank of Boston,*
Plaintiff in Error,

v.

MARY J. EATON.

BRIEF FOR DEFENDANT.

STATEMENT OF FACTS.

This is a writ of error to reverse a judgment of the Circuit Court of the United States for the District of Massachusetts.

The suit in the Circuit Court was brought on the fourteenth day of March, 1883, to recover an assessment of eight thousand dollars upon eighty shares of stock in the Pacific National Bank, claimed by the receiver to have been owned by the defendant in error on Nov. 27, 1882, when an assessment upon the stockholders of the bank was made by the Comptroller of the Currency.

Record, page 5.

The defendant in error was the owner of forty shares of such stock at that time, and the facts as to her alleged ownership of the remaining forty shares are as set forth in the

brief for her filed in the suit of the receiver, as plaintiff in error against her, to reverse a final judgment of the Supreme Judicial Court of Massachusetts in her favor for the amount of money paid by her for forty shares in a proposed increase of the capital stock of the bank.

The suit in the state court to recover the money paid by the defendant in error to the bank was brought on the fourteenth day of March, 1882. The assessment, by the comptroller, which, it will be observed, does not assume that the capital of the bank was one sum rather than another, was made on the twenty-seventh day of November, 1882.

March 14, 1883, while the suit in the state court was still pending, the receiver sued the defendant in error in the Circuit Court to recover the assessment, and it is to reverse the judgment in that suit that this writ of error is brought.

May 10, 1887, the defendant in error recovered final judgment in the state court against the defendant therein (who was the plaintiff in the suit in the Circuit Court, and is now plaintiff in error in this suit), for the money paid by her to the bank for forty shares of stock in the proposed increase.

May 14, 1887, the receiver, defendant in the suit in the state court, sued out a writ of error to this court to reverse the judgment of the state court.

Record, page 17.

May 31, 1887, the defendant in the Circuit Court pleaded the recovery of the judgment by her in the state court in bar of the suit against her in the Circuit Court to recover the assessment upon the forty shares of stock, which the plaintiff in that suit alleged she owned in the increased capital of the bank.

Record, pages 7, 8.

Upon the trial in the Circuit Court the defendant put in evidence the record of the suit and judgment in the state court, and the plaintiff put in evidence the proceedings upon the writ of error to reverse said judgment, under an agreement by which all objections to the competency or materiality of either was saved to each party.

Record, page 18.

The Circuit Court ruled that the judgment of the state court was a bar to the plaintiff's recovery, so far as the forty shares of alleged new stock in the proposed increase of capital of the bank were concerned, and ordered judgment for the plaintiff for $5,172 only, being the amount of the assessment upon the forty shares of original stock, which it was not disputed that the defendant owned in the original capital of the bank.

The receiver excepted to that ruling so far as it precluded him from recovering a like sum in addition, as an assessment on the other forty shares alleged by him to have been owned by the defendant in the increase of the capital of the bank.

Record, page 57.

POINTS AND AUTHORITIES.

I.

The primary question upon this record is whether the ruling of the Circuit Court that the judgment of the state court, that the plaintiff in the suit therein (the defendant in the Circuit Court) was entitled to recover the money, by the payment of which it was alleged by the defendant in that suit (plaintiff in the suit in the Circuit Court) that she

became the owner of said forty shares in the proposed increase of the capital of the bank, *upon the ground that that payment did not make her the owner thereof*, was a bar to the recovery against her in the Circuit Court of an assessment upon said shares on the ground that, by the payment of the $4,000 therefor, *she did become the owner thereof*.

It is obvious that the question raised in the suit in the state court was the same question raised in the suit in the Circuit Court, *i. e.*, whether at the time the plaintiff in the state court (the defendant in the Circuit Court) demanded back her money from the bank, and at the time of the assessment, upon which the suit in the Circuit Court was brought, she *was a creditor of the bank, or a stockholder therein, by reason of her payment of $4,000 for forty shares of stock in the alleged increase of the capital of the bank*. The suit in the state court was upon the sole ground that the plaintiff therein (the defendant in the Circuit Court) was not a shareholder of said forty shares. If she was a holder of those shares, she was not entitled to recover. If she was not a holder of those shares, she was entitled to recover. That suit resulted in a final judgment by the state court that the plaintiff therein (defendant in the Circuit Court) was not a holder of the forty shares, for the assessment upon which the receiver sought to charge her in the suit in the Circuit Court. That is to say: *precisely the same question which was raised in the suit in the Circuit Court, so far as the assessment upon the forty shares in the alleged increase in the capital of the bank was concerned, was previously raised and adjudicated by the final judgment in the state court between the same parties.*

The ruling of the Circuit Court, therefore, that the judgment in the state court estopped the receiver to recover against the defendant upon the ground that she was a

holder of the forty shares in the alleged increase, was correct.

Jones *v.* Richardson, 5 Metcalf, 247.
Outram *v.* Morewood, 3 East, 346.
Eastmure *v.* Laws, 5 Bing. N. C. 444.
Henderson *v.* Henderson, 3 Hare, 100 — 115.
Miles *v.* Caldwell, 2 Wall. 35.
Miller *v.* Manice, 6 Hill, 114, 131.
Steam Packet Co. *v.* Sickels, 24 How. 342.
Cromwell *v.* Co. of Sac, 94 U. S. 351.
Ex parte Flippin, 94 U. S. 350.
Bigelow on Estoppel, 129, 130.

The case of Mo. Pacific Rwy. *v.* Levy, 17 Mo. App. 507, is precisely in point on this contention.

There, certain persons made notes to the order of a railroad company, and deposited them with one Tygard, to be delivered to the company when it had built a railroad and located a station in a certain place, *i. e.*, when it had performed a condition. Afterwards the company, claiming that it had performed the condition, brought replevin against Tygard for the notes. The makers of the notes voluntarily appeared and defended the replevin suit on the ground that the condition had not been performed. The court rendered judgment for the company, and Tygard gave up the notes to the sheriff, who delivered them to the company, which then, pending an appeal by the makers of the notes, brought suit upon the notes against the makers. The court held, first, that the suit could be maintained, notwithstanding the pendency of the proceeding on appeal, because the appeal was, under the statutes of Missouri, "in the nature of a writ of error." Second, that the makers of the notes were estopped by the judgment in the replevin

suit to allege and prove that the company had not performed the condition upon which the notes were delivered, although it appeared that certain matters which might have been set up in the replevin suit in defence were not set up, and the makers claimed the right to set them up, in the suit upon the notes.

It will be observed here that the receiver appeared to defend the suit in the state court on the 5th of May, 1886, when the same was tried; and on the 13th of November, 1886, the removal of the receiver and the appointment of his successor were entered of record in the state court, while the judgment was not rendered until the 10th of May, 1887. It is conceded that the receiver actually defended the suit, and it is well settled that "if a party actively participates in the trial of a case in which he is interested, as by employing counsel and controlling the same, he is concluded by the judgment therein, though he does not formally appear therein."

Mo. Pacific Rwy. Co. *v.* Levy, 17 Mo. App. 508, and citations.

Indeed, the suit in the state court was necessarily a suit against the receiver, *i. e.*, against the assets of the bank. As soon as the bank passed into the hands of the receiver it was his duty to defend the suit, for, under the law, he was bound to put the judgment recovered in it upon the list of claims for dividends from the assets of the bank. (U. S. Rev. Stats., Sect. 5236.)

II.

The pendency of the writ of error to reverse the judgment of the state court did not deprive that judgment of its effect as an estoppel in the Circuit Court.

The only effect of a writ of error is to bring the question of whether the judgment, alleged to be erroneous, is so, before a tribunal competent to reverse it, if it is found to be erroneous. The writ only operates as a mode of attacking the judgment, and until the judgment is reversed by a final judgment in the suit in error, it stands as valid for all purposes. It is for this reason only that a supersedeas, or stay of execution, is necessary to prevent the judgment being satisfied pending the suit in error. The supersedeas simply stays the execution of the judgment, and has no effect upon it as an estoppel between the parties. The judgment is one thing, the execution of it another. The judgment stands for all purposes, until it is reversed; and if, in the mean time, it is satisfied or paid, the party satisfying or paying it may upon the reversal recover back the money paid.

Bank of the United States *v.* Bank of Washington, 6 Peters, 8.

A writ of error is not a continuation of proceedings in the suit in which the alleged erroneous judgment is rendered, but is an original writ commencing a new action.

Coke, Littleton, 288.
2 Tidd's Prac. 1141.
Gregg *v.* Bethea, 6 Porter (Ala.), 9.
Ripley *v.* Morris, 2 Gilman (7 Ill.), 381, 382.

A writ of error is a new suit, and is "less an action between the original parties than a question between the judgment and the law. It is not the action which is to be judged, but the judgment."

Allen, Ball & Co. *v.* Mayor, etc., 9 Ga. 286, 293.

"The only effect of an appeal to a court of error when

perfected is to stay execution upon the judgment from which it is taken. In all other respects the judgment, until annulled or reversed, stands binding upon the parties as to every question directly decided."

Nill *v.* Comparet, 16 Ind. 107.
Rogers *v.* Hatch, 8 Nevada, 35.
Suydam *v.* Hoyt, 25 N. J. L. 230.
Gifford *v.* Whalen, 8 Cush. 428.
Bank *v.* Wheeler, 28 Conn. 433, 442.
Burton *v.* Reeds, 20 Ind. 87.
Burton *v.* Burton, 28 Ind. 342.
Walls *v.* Palmer, 64 Ind. 493, 496.
Rundles *v.* Rundles, 67 Ind. 439.

There is no decision that the pendency of a writ of error deprives the judgment sought to be reversed of its effect as an estoppel in bar.

Freeman on Judgments, § 328.

An attempt was made upon argument in the Circuit Court to avoid the effect of the judgment in the state court by a suggestion that the parties in that suit, and the parties in the suit in the Circuit Court, were not in reality the same. It was urged that the suit in the state court was between a stockholder and the corporation, while the suit in the Circuit Court was between the receiver representing the creditors of the corporation and a stockholder of the corporation. A decisive answer to that suggestion is found in the fact that the receiver actually defended the suit in the state court, and also in the first sentence of the opinion of the state court, stating that the action was defended by the receiver, as he desired that it should be prosecuted for the purpose of determining the liability of the bank.

This was the proper course, as the Act of Congress provides that a receiver, in making a basis for a dividend, shall include in the list, not only claims proved before him to his satisfaction, but also claims adjudicated in a court of competent jurisdiction.

Bank of Bethel *v.* Pahquioque Bank, 14 Wall. 391.

It is also to be observed that the receiver represents not creditors alone, but also the bank and the stockholders, so that the suit in the Circuit Court was as much between stockholders and the bank as the suit in the state court.

Case *v.* Terrell, 11 Wall. 199.

A still further answer, however, to this suggestion is that the decisions with reference to the rights of creditors as against shareholders, *i. e.*, persons holding, or claiming to hold, actual existing stock, as in a case where stock is conceded to have once existed, and the question is, whether it is owned by one person or another, or whether it has been cancelled in a reduction, have no application to a case *where the question is whether stock exists, which is this case.*

See Chapman and Barker's case, L. R. 3 Eq. 365, 366.

Morawetz on Corps., §§ 843, 845, and citations.

Russell *v.* Bristol, 49 Conn. 251.

III.

Even if the judgment of the state court is reversed upon the writ of error pending in this court, still the judgment of the Circuit Court cannot be reversed upon the ground that the ruling, that the judgment of the state court, *while it existed unreversed*, was an estoppel, was wrong.

If the judgment of the state court was, when it was put in evidence in the Circuit Court, an effective estoppel, then the ruling of the Circuit Court that it was a bar to the recovery by the receiver of the assessment upon the forty shares, was correct, and it necessarily follows that the judgment of the Circuit Court cannot be reversed upon error to this court upon the ground that that ruling was wrong.

IV.

If the judgment of the state court did not estop the receiver to recover an assessment upon the forty shares alleged to have been owned by the defendant in error in the proposed increase of the capital of the bank, then upon the facts in the case it should have been held that the defendant was not a holder of such shares, and therefore the judgment of the Circuit Court should not be reversed. Upon this point the defendant in error submits the argument made thereon in the suit to reverse the judgment of the state court argued with this case, and filed herewith.

J. H. BENTON, JR.

United States Supreme Court.

FILED.
OCT 6, 1890
JAMES H. MCKENNEY
CLERK

PETER BUTLER, RECEIVER, P. E.

v.

MARY J. EATON.

WRIT OF ERROR TO CIRCUIT COURT.

Plaintiff's Brief.

This case differs in its facts very little if any from that of Pacific National Bank, P. E. *v.* Eaton, argued upon brief herewith, except in this: The *de facto* increase of the capital is brought out and presented more accurately and in more detail, showing more fully when defendant in error was entered on the books as owner of the forty shares of new stock paid for, and a certificate issued, ready for delivery on call, the stock and certificate being dated and issued on October 1, 1881, both to her and to most of the others who paid in like manner: that the stock had been issued and delivered to others, sold in the market as of date October 1, 1881, and transferred on the books on and after that date: that the money was used as capital and lost in the business of the bank, and that she, by her agent, with sufficient knowledge of the facts, clearly waived all objections, acquiesced, and was estopped, and that what was done by the Comptroller of the Currency in the premises was in pursuance of the action and request of the bank, or the directors. A *de facto* increase in the first place was only made one *de jure* by supplying the requisite formalities prescribed by R. S., § 5142.

There is also in the record, evidence admitted, subject to objection and excepted to, of the proceedings in the State Court relied upon as a judgment, operating as a bar to a recovery in part, by way of alleged *res adjudicata*, with a ruling sustaining the plea in that behalf. The action was brought by the Receiver against Miss Eaton to enforce her individual liability as the

holder of eighty shares of capital stock in obedience to an order of the Comptroller of the Currency, of date November 27, 1882. Her liability on account of forty shares, the old stock, was conceded, and the liability on the alleged new shares alone contested. The entire facts were agreed upon and found, and are stated in the record. The Court below held the defendant in error liable on the whole eighty shares, independently of the judgment in the State Court, but adjudged that to be a bar, as *res adjudicata*, as to the claim made on the forty shares of alleged new stock; and in this latter aspect it is contended that he erred, as well as in admitting the record of the State Court in evidence.

ASSIGNMENT OF ERRORS.

We assign as error, that the Court admitted in evidence the record of the State Court case as incorporated in the record, against the objection of the receiver that it was incompetent and immaterial, and gave effect to the same as a bar by way of estoppel, to one half of the claim of the receiver: and in that, that the Court, upon the facts and evidence found, gave judgment for only $5,172, when it should have been $11,344, upon all the facts and evidence agreed, and upon an opinion of his own expressed to that effect independently of the judgment of the State Court. (Rec. 56.)

ARGUMENT.

It will be seen that the supplemental answer, made to the whole case (p. 7), says, among other things, that the defendant recovered judgment *against the receiver* in the State Court, not againgst the bank. The record admitted in evidence was distinctively of a judgment against the bank, not the receiver. Hence it was incompetent evidence, and not admissible under the answer. The causes of action are not the same. One was brought by Miss Eaton, before the bank failed, to recover money had and received to her use, as alleged in one count, and for a violated contract as set up in the second count. The

other is brought by the receiver to enforce an individual statute liability of the defendant as the holder of eighty shares of stock as alleged. It is claimed that a decision that she was entitled to recover the money paid, either under first or second count, as against the bank, is an adjudication that she was not individually responsible as holder of the stock for the assessment laid by the Comptroller of the Currency. We submit that the *res* adjudicated in the State Court case, is not the *res* in issue in the case at bar. The issues are not the same. The several liabilities alleged in each suit may exist together consistently with each other. The bank may be liable because of some agreement with her, while she at the same time may be the holder and owner of the stock as against the public, the receiver representing the creditors, and for the purposes of the assessment, either as *de facto* stock, or as shares *de jure*, or because of her being held out as owner. "Estoppels are conclusive only as to facts directly put in issue and determined in the former suit." (Hooker *v.* Hubbard, 102 Mass., 245; Co. *v.* Meyrose, 27 Fed. Rep., 213.) Unless the *res* adjudicated is directly or by necessary and inevitable inference the same *res* in issue now, there is no estoppel. (Burlen *v.* Shannon, 99 Mass., 203.) "Judgments of Courts of concurrent jurisdiction are evidence only where the same matter comes distinctly (*i. e.* directly) in issue between the same parties." Ld. Chelmsford, 4 Macq., 913.)

They operate as estoppels only as to matters essential to the decision, that is, only as to facts without the existence and proof or admission of which they could not have been rendered. (Colt, J., 109 Mass., 268-9.) In order that a *res adjudicata* may be available either as a bar or an exception, it is necessary that there should have been, in the former action, the same thing, as the subject matter of the litigation, *the same quantity*, the same right, the same ground of action, the same person suing in the same character. (Bigelow on estoppel, p. 6; Dig. 44, 2, 12, Lib. 14.)

In Packet Co. *v.* Sickles, 5 Wal., 580, Nelson, J., says: "When the judgment is cited in pleading as a technical estoppel, or is relied on by way of evidence as conclusive *per se*, it must appear by the record of the former suit that the particular con-

troversy sought to be concluded was necessarily tried and determined," etc., etc.

Wood v. Jackson, 8 Wend., 10.
W. P. Co. v. Sickles, 24 How., 333.
Lyon v. Co. 102 U. S. 699

In the State Court case it was not open to the receiver to try the issue as affecting the personal liability now in question.

Now as the record put in, and to which objection was made and exception taken, only shows a judgment against the bank, and determines its liability on March 14, 1882, on a report of different facts and another issue than that here. It does not appear from the record that the two issues raised in the respective suits are the same, and that they have been decided in the State Court case. The issue in the State Court case was not necessarily identical with that in the case at bar, much less is it co-extensive therewith. The record as produced must show this in and of itself so that it could be pleaded and would stand alone as a bar, and not need to be pieced out by other facts and evidence. The record cannot thus be enlarged by parol evidence, in order to make it effective as a bar.

The liability for the assessment depends upon the state of things on May 20, 1882, when the bank failed. The right to recover in the State Court suit against the bank depended upon the status March 14, 1882. The receiver represents the creditors only in the suit at bar, not the bank in any sense, as the association had no power to enforce the individual liability.

Irons v. Manf. Nat. Bk., 27 Fed. Rep., 592.
2 Morawetz, P. Corp. §§ 869, 872, notes.

The bank may be liable, and yet the stockholder be liable for the assessment as against the general creditors.

In the State Court, he, the receiver, moved for leave to appear, and was admitted to defend, in the name of the bank. In so doing, he represented the Association. The capacity in which he acts is not therefore the same in each case. In the case at bar he represents only the general creditors in the discharge of trust obligations in their behalf alone. In the State Court case, there appears in the record in evidence, no allegations made that the bank had become insolvent and passed into the

Such is the legal effect of what the State Court decides, in holding as they did that the increased stock was valid as to the public, per force of the certificate of the comptroller, while the money could be recovered of the bank by reason of an implied contract obligation (144 Mass. page 273). As argued in that case here, the

hands of a receiver to be wound up, and therefore the superior rights of the general creditors, as contra-distinguished from those of the association, were not open, and presumably were not tried nor adjudicated.

The case at bar shows that a writ of error was taken and allowed by the acting Chief Justice, and the judge who gave the opinion, within ten days after the judgment, the judgment being rendered May 10, 1887, and the writ of error being allowed May 14, 1887, on the ground that the case raised and was determined upon a federal question. The writ of error operated as a *supersedeas*. The receiver being the party taking it, presumably and in fact by order of a Department of the National Government, was not required to give bonds. (Case of Mixter, 114 U. S., 463.)

We submit that the adjudication in the State Court is not a bar, for another reason.

The writ of error is not a new suit, but a continuation of the same litigation. In Cohens v. Va., 6 Wheaton, 410-11, Marshall, Ch. J., says the mode of taking the case up, whether by writ of error or appeal, is form, not substance: that the object was to prevent parties litigant from eluding the Federal Courts, whose sole province it is to construe the Constitution and Laws of the United States. While the writ of error is the only mode prescribed in the Judiciary Act as regards a State Court, and was adopted in analogy to the process in England, the incidents are not necessarily all the same. There it was treated as a distinct and separate suit. Under the Judiciary Acts, the writ of error has been treated in this Court as a continuation of the same litigation.

Martin v. Hunter, 1 Wheat., 347.
Nations v. Johnson, 24 How., 205.
Clark v. Mathewson, 12 Pet., 120.
Slaughter H. cases, 10 Wal., 282.
Cohens v. Va., 6 Wheat., 410-11.

State Court decisions depend largely upon local laws. The following cases are, however, in point, and of more or less weight.

Byrne v. Prother, 14 La. An., 653.
Woodbury v. Bowman, 13 Cal., 634.
Murray v. Green, 64 Cal., 369.

We contend that a writ of error to the State Court taken in season to operate as a *supersedeas*, carries the case up, suspending the jurisdiction of the State Court, and taking the case as it stood at the point when judgment was to be rendered. Under R. S., § 709, unlike cases from the Federal Courts, this Court may render final judgment and issue executions direct, and are not required to send down a mandate to the State Court. (Bump. on F. P., p. 361.)

There are the following cases which seem to be adverse to the view taken, at first blush. But they do not conclude us on the point.

Railway Co. *v.* Nav. Co., 27 Fed. Rep., 277.
Railway Co. *v.* Twombly, 100 U. S., 81.

The cases did not raise, and depend upon, federal questions. The first case went off on an estoppel found in a suit where there was no writ of error. In the second, the party sought to get rid of a judgment on the ground of a repeal subsequently of the statute on which the suit rested, and where there were no exceptions in matters of law before the Court, so that the writ of error had only to be dismissed as not warranted. It is upon this case that the *dictum* in Godrich and Wilson, 135 Mass. 31, rested, there being no *supersedeas* in that case, and the question at issue being a direct one, arising in the proceedings of the same suit. In Sharon *v.* Hill, 26 Fed. Rep., 357, and Case in 27th Fed. Rep., *supra*, a distinction is made between an appeal and a writ of error.

It is undoubtedly true that the judgment must stand for all the purposes of the suit, until it is affirmed or reversed on writ of error, the same being suspended meanwhile. It is suspended, however, for all practical purposes. No execution can be issued. The party obtaining it cannot bring a suit upon it, and get judgment or execution and enforce that. There is *a supersedeas and a stay of execution*. The object is to prevent the judgment from being used as conclusive meanwhile for any purpose, except as the foundation of a writ of error. It cannot be used as a set-off in another suit, or as a debt provable in bankruptcy, or for proof before the receiver as a basis of dividend.

It ought not to be allowed to operate as an estoppel, as *res judicata*, in another suit on a different cause of action, as either of these uses would virtually be one mode of executing a judgment which has been suspended and is superseded.

If there is a distinction between an appeal and a writ of error, as said in Railway Co. *v.* Nav. Co., 27 Fed. Rep., 277, and in Sharon *v.* Hill, 26 Fed Rep., 357, the writ of error to the State Court ought not to be given the effect of an appeal. There is no reason why a litigant should be allowed to have the benefit of a conclusive judgment of the State Court on a federal question, when only the judgment of this Court was designed to be a conclusive and final adjudication, and that is being sought in the only mode allowable.

The following, taken from the brief of counsel in Slaughter House cases, 10 Wal., 281, states the argument well: "Under the practice by which causes are removed from the State Courts to this Court, the removal is in the nature of an appeal. It is a continuation of the same litigation, not a new suit, as is a writ of error at common law. The mode of removal is only a matter of form. The substance of the matter is that the cause is brought before a supervising tribunal for revision; and the jurisdiction of the United States Court is in its nature appellate. The writ of error is only a new stage in the suit; and an injunction should continue in force until the determination upon the writ of error, which is the ultimate determination of the suit."

A *supersedeas* order is directed not only to the parties and the executive officers, but also to the Judges of the Courts.

The English decisions as to the effect of a writ of error upon the judgment in the Court below, as illustrated and discussed in Doe *v.* Wright, 10 A. & E., 763, are not in point or conclusive. There the practice was different. There was no law on the subject. It was only a matter of practice in the Courts, they exercising their discretion in the premises.

Kempland *v.* Macauly, 4 T. R., 436.
Meriton *v.* Stevens, Willes 271.
Taswell *v.* Stone, 4 Burr 2454.

In this country, under the judiciary act, bonds are required with some exceptions, and a *supersedeas* is expressly provided

for. State Courts cannot conclude parties on federal questions, in case a writ of error is obtained with a *supersedeas*.

The manifest purpose of the *supersedeas* is to stay the operation of the judgment for any purpose during the pendency of the writ of error.

Even in England, in Curling *v.* Innes, 2 H. Bl., 372, the surety of a judgment debtor was allowed to plead the pendency of a writ of error on the original judgment.

In England it was held in Dighton *v.* Granvil, 4 Mod., 247, that debt on a judgment lies during a pendency of the writ of error. It would seem also by Reynolds *v.* Beerling, in a note to Evans *v.* Prosser, 3 T. R., 188, that a judgment is available as a set-off after the error brought.

This can be hardly so in this country, as that would render the *supersedeas* of no account.

Finally, we contend that inasmuch as the Circuit Court had before it all of the facts, the counsel agreeing to the same, and the defendant in error did not see fit to rest her case upon a plea in bar, but put in independent evidence, and the adjudication of the State Court was on one only of the many facts agreed upon the Court below should have proceeded to consider and adjudge the whole case, and enter judgment for the whole amount in accordance with his own opinion, as expressed in the record.

Upon the evidence of Mr. Thayer, put in by her, coupled with the other facts, the case at bar showed a waiver, acquiescence, and an estoppel, as to general creditors on the issue now presented. It may not have been so as to the bank while solvent.

If the plea in bar is not upheld, this Court should enter judgment for the receiver upon the whole facts agreed and found. The evidence introduced and not in dispute shows a clear case for the receiver.

If the State Court case shows error, the situation would be embarrassing, if the plea in bar is sustained here, possibly the receiver would be without remedy.

We refer to the main brief in the State Court case for argument upon the rest of the case.

A. A. RANNEY.

In that event, however, we contend that this court, having the case under control, should disaffirm the judgment, and remand the case, as the direct and most practical way of remedying the evil. What the remedy would be if this cannot be done, whether by *audita querela*, is not so clear.

MOTIONS TO DISMISS AND CERTIFICATE OF CLERK OF CIRCUIT COURT FOR THE NORTHERN DISTRICT OF FLORIDA.

SUPREME COURT, U. S.
FILED,
MAR 4 1891
JAMES H. McKENNEY,
CLERK

IN THE UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1890.

No. 1354.

E. T. WILLIAMS, AS ADMINISTRATOR OF THE ESTATE OF J. E. WILLIAMS ET ALS. AND PLAINTIFFS IN ERROR.

vs.

THE PASSUMPSIC SAVINGS BANK, DEFENDANT IN ERROR.

Now comes the defendant, the Passumpsic Savings Bank, and appears specially by Henry C. Ide, its attorney, solely for the purpose of moving the court to dismiss said writ, and moves the court to dismiss the writ of error in said cause on file for the following reasons:

First, because said cause is a suit in equity and not at law and for that reason a writ of error does not lie to revise the proceedings of the United States Circuit Court in the premises.

Second, because the proceedings sought to be revised by said writ of error terminated in a final decree and judgment on the 19th day of October, 1889, at a term of the United States Circuit Court in and for the Northern District of Florida, which term finally terminated and adjourned on the 22nd day of November, 1889, and said writ of error was not sued out until the first day of July, 1890, and no citation has ever been issued or served in said cause.

The Passumpsic Savings Bank by
HENRY C. IDE, *its Attorney.*

E. T. WILLIAMS, AS ADMINISTRATOR OF ESTATE OF J. E. WILLIAMS, ET AL., APPELLANTS,

vs.

THE PASSUMPSIC SAVINGS BANK, APPELLEE.

Now comes the appellee, the Passumpsic Savings Bank, specially by Henry C. Ide, its solicitor, and moves the court to dismiss the appeal in said cause on the following grounds:

First. There has been no citation issued or served in said cause.

Second. There has been no appeal entered, taken, prayed for or allowed in said cause.

Third. The said final decree in said cause was rendered and entered of record at a term of court of said Circuit Court for the Northern District of Florida on the 19th day of October, A. D. 1889, and the said appeal bond was filed at a different and subsequent term on the 3rd day of December, A. D. 1889, so that if filing said bond were held to be an entry of appeal it was not made at the term of court at which the decree was rendered and a citation should have issued to appellees.

Fourth. The appeal bond was not in accordance with the Statute in such case provided, in that it is not conditioned to answer and pay the costs generally, but only such costs as are sustained by the appellee.

The Passumpsic Savings Bank by
HENRY C. IDE, *its Solicitor.*

E. T. WILLIAMS, AS ADMINISTRATOR OF THE ESTATE OF J. E. WILLIAMS ET ALS. PLAINTIFFS IN ERROR,

vs.

THE PASSUMPSIC SAVINGS BANK, IN ERROR.

I, Philip Walter, Clerk of the United States Circuit Court, in and for the Northern District of Florida, Fifth Circuit, do hereby certify that an adjourned special term of said court was finally adjourned Friday, November 22nd, A. D. 1889, and that the regular December term of said court was commenced Monday, December 2nd, A. D. 1889.

PHILIP WALTER,

Clerk of the United States Circuit Court in and for the Northern District of Florida, Fifth Circuit.

EXTRACTS FROM THE TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1354.

EDWIN T. WILLIAMS, AS SHERIFF, &c., ET AL., APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

THE PASSUMPSIC SAVINGS BANK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF FLORIDA.

* * * * * * *

(Record, pp. 108–113.)

In United States Circuit Court, Northern District of Florida.
In Chancery.

THE PASSUMPSIC SAVINGS BANK, Complainant,
vs.
EDWIN T. WILLIAMS, as Sheriff of Marion County, State of Florida, and *ex Officio* Administrator of Estate of John E. Williams, Deceased; Edwin T. Williams, in His Own Right; John D. Williams, Dora Williams, Josie C. Williams, Alice A. Voght, Carrie L. Pelot and Her Husband, William A. Pelot; Jessie K. Whitesides and P. W. Whitesides, Her Husband, Defendants.

This cause coming on this day for final hearing upon the bill, answer, and replication, cross-bill, answer, and replication thereto and evidence heretofore filed herein, and having been argued of counsel for said complainant and defendants, and the court having considered of its decree herein, it is ordered, adjudged, and decreed

that complainant is entitled to the relief prayed in its bill in this cause.

It is further ordered, adjudged, and decreed that the cross-bill herein be dismissed, with costs against the complainants in said cross-bill, defendants to the bill herein.

It is further ordered, adjudged, and decreed that the reports of Philip Walter, as special master herein, finding the several amounts due to complainants herein be, and same is hereby, confirmed.

It is further ordered, adjudged, and decreed that there is due the defendant Edwin T. Williams, as administrator of the estate of John E. Williams, deceased, and out of said estate, to the complainant in this cause the sum of four thousand dollars as principal and three thousand two hundred and thirty-six $\frac{31}{100}$ dollars as interest upon the note and mortgage sued upon in this cause, together with one hundred and six $\frac{31}{100}$ dollars for taxes paid by complainant upon the hereinafter-described premises, together with seven hundred and twenty-five dollars as solicitors' fees in this cause.

It is further ordered, adjudged, and decreed that to secure the payment to the complainant of the said sums of money hereinabove described to be due to it that said complainant has a first-mortgage lien upon the said mortgaged premises in said bill in this cause mentioned by reason of the said mortgage of complainant attached to the bill in this cause and prayed to be enfored as such first lien upon said mortgaged premises described as follows:

The southeast quarter (S. E. $\frac{1}{4}$) of section thirteen (13), township sixteen (16) south, range twenty-one (21) east, and the northwest quarter (N. W. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) and the south half (S. $\frac{1}{2}$) of the southeast quarter (S. E. $\frac{1}{4}$) and the south half (S. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) of section eighteen (18), township sixteen (16) south, range twenty-two (22) east.

And the west half (W. $\frac{1}{2}$) of the northwest quarter (N. W. $\frac{1}{4}$) of section nineteen (19) and the southwest quarter (S. W. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$), also of section nineteen (19), in township sixteen (16) south, of range twenty-two east.

And the east half (E. $\frac{1}{2}$) of the northeast quarter (N. E. $\frac{1}{4}$) and the northeast quarter (N. E. $\frac{1}{4}$) of the southeast quarter (S. E. $\frac{1}{4}$) section twenty-four (24), township (16) south, range twenty-one (21) east.

And the northwest quarter (N. W. $\frac{1}{4}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section nineteen (19), township sixteen (16) south, range twenty-two (22) east, according to the United States surveys.

It is further ordered, adjudged, and decreed that the defendant Edwin T. Williams, as administrator of the estate of John E. Williams, deceased, or any such of the other defendants herein as may desire to redeem the said mortgaged premises from the said mortgage, do, within five days from the date hereof, pay to the complainant the said sums of money so decreed to be due to it, together with the costs of this cause.

It is further ordered, adjudged, and decreed that in the event that said defendants shall fail to make said payments within the time herein specified that Philip Walter, Esqr., as special master of this

court in this cause, heretofore appointed by order of this court in this cause, dated February 11th, A. D. 1889, by consent of the parties complainant and defendant, and for the convenience of this court and the parties and for the same reasons and on account of his familiarity with this cause by reason of such former appointment, do advertise the said mortgaged premises for sale for thirty days prior to such sale, as required by law and the practice of this court, in a newspaper published in the city of Jacksonville, Florida, and also in a newspaper published in Ocala, in county of Marion, State of Florida, and, after giving said thirty days' notice by such advertisement, do sell the said mortgaged premises, at public outcry, to the highest bidder therefore, before the court-house of this court, in city of Jacksonville, Florida, on a legal sale day immediately following such notice of sale, unless said sale be continued after such sale day to the next sale day, in which event said master shall so announce and continue publication of such advertisement of notice of sale, with addition thereto of notice of such continuance of said sale.

It is ordered, adjudged, and decreed that said master do report his actings and doings in the premises and the said sale to the court for its confirmation, and, upon such confirmation, he do execute to the purchaser or purchasers a deed of said mortgaged premises, and that the said purchasers on obtaining such deed be let into the possession of said premises, and that such purchaser or purchasers have the writ of assistance of this court, if necessary, to put him, her, it, or them into possession of the same.

It is further ordered, adjudged, and decreed that out of the proceeds of said sale that said special master do pay the costs and expenses of this suit, including the costs of said sale, subject to the conditions and provisions hereinafter —, and then the solicitor's fee herein provided, then any taxes paid by complainant or now due on the premises, and then the principal and interest of said amounts due complainant as herein decreed, and if any balance remain in his hands that he pay the same into the registry of this court, to be disposed of as this court may direct and the case require.

It is further ordered, adjudged, and decreed that said master do report his action in the matter of said disposition of said proceeds of said sale to this court, together with the vouchers of said payments and showing what balance, if any, is due complainant above the proceeds of such sale, and that in the event a balance is still due complainant over and above the amount realized at said sale, then and in that event that all the defendants herein, except Carrie L. Pelote and Jessie K. Whitesides are required to pay the costs of this suit, occasioned by the pleadings, defences, and claims interposed in this cause by said defendants, to be taxed by the clerk of this court, and that complainant have execution against said defendants for same, and that for any such balance still due complainant upon the amounts decreed herein to be due to it that said complainant have judgment and execution generally against said defendant, Edwin T. Williams, as administrator of the estate of John E. Willians, deceased, to be levied of any lands and tenements,

goods and chattels, that were of said John E. Williams in his lifetime.

It is further ordered, adjudged, and decreed that after the confirmation of said sale that the defendant- and all persons claiming under them be, and they are hereby, forever barred and foreclosed of and from all equity of redemption in and to said mortgaged premises and every part thereof, and that said tax sale of June 16th, 1887, to defendant John D. Williams, mentioned in the bill, was but a payment of the taxes upon said mortgaged premises, and the amount paid by him having been tendered to him by complainant, that said alleged tax sale was also thereby redeemed and is of no force or effect.

CHAS. SWAYNE,
U. S. Judge.

Done in open court Oct. 19th, 1889.

Endorsement: U. S. circuit court, northern district of Florida. The Passumpsic Savings Bank *vs.* E. T. Williams, as administrator of estate of John E. Williams, dec'd, *et al.* Final decree. Filed Oct. 19th, 1889. Philip Walter, clerk.

(Record, pp. 114-115.)

In United States Circuit Court in and for the Northern District of Florida, Fifth Circuit. In Chancery.

THE PASSUMPSIC SAVINGS BANK
vs.
EDWIN T. WILLIAMS, as *ex Officio* Administrator, *et al.* } Bill.

EDWIN T. WILLIAMS, etc., as *ex Officio* Administrator of Estate of John T. Williams, *et al.*
vs.
PASSUMPSIC SAVINGS BANK. } Cross-Bill.

It is hereby agreed by complainant and defendants in the above-entitled cause that an order may be made in *in* this cause directing the master to continue the sale of the property heretofore decreed in said cause to be sold Monday, December 2nd, A. D. 1889, until 12 o'clock noon, December 2nd, 1889, in order that the court may inspect appeal bond of defendants, to be filed before the last-named hour; this order to be conditioned upon defendants paying all court costs and advertising before said last-named hour. December 2nd, 1889.

MILLER & SPENCER,
EDW. M. CHENEY,
Solicitors for Complainant.
C. P. & J. C. COOPER,
Solicitors for Defendant.

Upon the foregoing consent, it is ordered that the sale therein referred to be continued until December 3rd, 1889, at 12 o'clock noon, upon the conditions named in said agreement being complied with.

December 2nd, 1889.

CHAS. SWAYNE, *Judge.*

Endorsement: Filed Dec. 3, 1889. Philip Walter, clerk.

(Record, pp. 116–119.)

In the Circuit Court of the United States, Northern District of Florida. In Chancery.

THE PASSUMPSIC SAVINGS BANK OF ST. JOHNSBURY, VERMONT, Complainant,

vs.

EDWIN T. WILLIAMS, as Sheriff and *ex Officio* Administrator of the Estate of John E. Williams, Deceased; John D. Williams, Alice A. Vogt, Dora Williams, Edwin T. Williams, John D. Williams, Jessie C. Williams, Carrie L. Pelot and Her Husband, William A. Pelot; Jessie K. Whitesides and P. W. Whitesides, Her Husband, Defendants.

Bill to Foreclose Mortgage.

Bond on Appeal.

Know all men by these presents that we, Edwin T. Williams, as sheriff of Marion county, Florida, and *ex officio* administrater of the estate of John E. Williams, late of said county, deceased; John D. Williams, Alice A. Vogt, Dora Williams, Edwin T. Williams, in his own right; Josie C. Williams, Carrie L. Pelot and William A. Pelot, her husband; Jessie K. Whitesides and P. W. Whitesides, her husband, all heirs of John E. Williams, deceased, as principals, and John F. Dunn and Robert D. Harrison and —— ——, as sureties, are held and firmly bound unto the Passumpsic Savings Bank, a corporation organized under the laws of the State of Vermont, and residing and doing business in said State of Vermont, in the sum of six thousand dollars; the payment whereof, well and truly to be made, we do hereby bind our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Signed, sealed, and dated this 30th day of November, A. D. 1889.

The condition of the above obligation is such that whereas in a certain suit in equity, in the circuit court of the United States for the northern district of Florida, in which The Passumpsic Savings Bank of St. Johnsbury, Vermont, was complainant and the above-bounden Edwin T. Williams, as sheriff of Marion county, Florida, and *ex officio* administrator of the estate of John E. Williams, deceased; Edwin T. Williams, in his own right; John D. Williams, Alice A. Vogt, Dora Williams, Josie C. Williams, Carrie L. Pelot and William A. Pelot, her husband; Jessie K. Whitesides and P. W. Whitesides, her husband, were defendants, the said circuit court, on the 19th day of October, A. D. 1889, did render a final decree

of foreclosure against the said defendants in said suit, adjudging the sum of four thousand dollars to be due the said complainant for principal, and the further sum of four thousand & ninety-seven & $\frac{82}{100}$ dollars to be due the said complainant for interest and attorneys' fees, and the said defendants desiring to appeal from the said decree, as well as from certain interlocutory decrees made in said cause, to the Supreme Court of the United States of America, and to have all proceedings under the said decree stayed and superseded during the pendency of said appeal: Now, if the said appellants shall prosecute their said appeal to effect, and if they fail to make their said appeal good shall answer all damages and costs sustained by the said Passumpsic Savings Bank, then the above obligation to be null, void, and of none effect; else to remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals the day and year first above written.

EDWIN T. WILLIAMS, [SEAL.]
As Sheriff & ex Officio Adm. of John E. Williams.
E. T. WILLIAMS. [SEAL.]
JOHN D. WILLIAMS. [SEAL.]
MRS. ALICE A. VOGT. [SEAL.]
DORA A. WILLIAMS. [SEAL.]
JOSIE C. WILLIAMS. [SEAL.]
CARRIE L. PELOT. [SEAL.]
W. A. PELOT. [SEAL.]
JESSIE K. WHITESIDES. [SEAL.]
P. W. WHITESIDES. [SEAL.]
JNO. F. DUNN. [SEAL.]
ROBERT D. HARRISON. [SEAL.]

STATE OF FLORIDA, }
County of Marion. }

Before me personally appeared Jno. T. Dunn & Rob't D. Harrison and —— ——, who, being duly sworn, say that they are sureties on the foregoing bond and they are each severally worth the amount therein named, over and above all debts and constitutional exemptions, subject to execution.

JNO. F. DUNN.
ROBT D. HARRISON.

Sworn to and subscribed before me this 2nd day of Dec., 1889.

D. A. MILLER, *Clerk*,
[SEAL.] By R. B. BULLOCK, *D. C.*

Taken and approved.
CHAS. SWAYNE, *Judge.*

Dec. 3, 1889.

Indorsement: In the circuit court of the United States, northern district of Florida. In chancery. The Passumpsic Savings Bank *vs.* E. T. Williams *et al.*, def'ts. Bond on appeal. Filed Dec. 3, 1889. Philip Walter, clerk. Miller & Spencer, E. M. Cheney, def'ts' solicitors.

(Record, pp. 120–121.)

THE PASSUMPSIC SAVINGS BANK OF ST. JOHNSBURY, VERMONT, Complainant.
vs.
EDWIN T. WILLIAMS, as Sheriff and *ex Officio* Administrator of the Estate of John E. Williams, Deceased; John D. Williams, Alice A. Vegt, Dora Williams, Edwin T. Williams, John D. Williams, Jessie C. Williams, Carrie L. Pelot and Her Husband, William A. Pelot; Jessie K. Whitesides and P. W. Whitesides, Her Husband, Defendants.

The President of the United States to the honorable the judge of the circuit court of the United States for the northern district of Florida, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the Passumpsic Savings Bank of St. Johnsbury, Vermont, and Edwin T. Williams, as sheriff and *ex officio* administrator of the estate of John E. Williams, deceased; John D. Williams, Alice A. Vogt, Dora Williams, Edwin T. Williams, John D. Williams, Jessie C. Williams, Carrie L. Pelot and her husband, William A. Pelot; Jessie K. Whitesides and P. W. Whitesides, her husband, citizens and residents of the county of Marion and State of Florida, a manifest error hath happened, to the great damage of the said Edwin T. Williams, as sheriff and *ex officio* administrator of the estate of John E. Williams, deceased; John D. Williams, Alice A. Vogt, Dora Williams, Edwin T. Williams, John D. Williams, Jessie K. Whitesides, Carrie L. Pelot and her husband, William A. Pelot; Jessie K. Whitesides and her husband, P. W. Whitesides, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 1st day of July, 1890, and of our Independence the 114th.

[Seal of U. S. Circuit Court, Northern Dist. of Florida.]

PHILIP WALTER, *Clerk.*

(Record, p. 122.)

United States Circuit —, Fifth Judicial Circuit, Northern District of Florida.

PASSUMPSIC SAVINGS BANK OF ST. JOHNSBURY, VERMONT, Complainant,
vs.
EDWIN T. WILLIAMS, as Sheriff and *ex Officio* Administrator of the Estate of John E. Williams, Deceased, *et als.*, Defendants.

I, Philip Walter, clerk of the United States circuit court for the district and circuit aforesaid, do hereby certify that the foregoing pages, numbered from one to 121, inclusive, is a true, full, and complete transcript of the record and proceedings of the above-entitled cause from the files and records of my office.

Seal of U. S. Circuit Court, Northern Dist. of Florida.

Witness my hand and seal, at the city of Jacksonville, in the district and circuit aforesaid, this 30th day of September, in the year of our Lord 1890, and of the Independence of the United States of America the 115th.

PHILIP WALTER, *Clerk.*

(Endorsed on cover:) N. Florida C. C. U. S. No. 1354. Edwin T. Williams, as sheriff of Marion county, Florida, and *ex officio* administrator of the estate of John E. Williams, deceased, *et al.*, appellants and plaintiffs in error, *vs.* The Passumpsic Savings Bank. Filed October 7, 1890.

Office Supreme Court U. S.
FILED.
MAR 23 1891
JAMES H. McKENNEY,
CLERK.

IN UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1891.

EDWIN T. WILLIAMS, as Sheriff, &c., *et al.*, Plaintiffs in Error,
vs.
THE PASSUMPSIC SAVINGS BANK, Defendant in Error.

No. 1354. Consent to Dismissal & Motion for Leave to Withdraw Transcript.

Now comes the plaintiffs in error in the above-entitled cause, by H. Bisbee, their solicitor, and consent to granting the motion to dismiss, made by defendant in error; and plaintiffs in error move for leave to withdraw the transcript of the record on the ground that the failure to bring the cause within the jurisdiction of this court is not attributable — their negligence, but to that of their solicitors in the court below, and plaintiffs desire to take & perfect an appeal and should not be subjected to the expense of another transcript.

March 21st, 1891.

H. BISBEE,
Solicitor, &c.

[Endorsed:] Sup. Court U. S. 1890, Oct'r term. No. 1354. E. T. Williams, &c., app'ts & pl'ffs in error, *vs.* The Passumpsic Savings Bank. Consent to dismissal & motion to withdraw transcript. Filed Mar. 23, 1891.

FILED.
MAR 30 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1354.

EDWIN T. WILLIAMS, AS SHERIFF, &C., ET ALS., APPELLANTS AND PLAINTIFFS IN ERROR,

vs.

THE PASSUMPSIC SAVINGS BANK, APPELLEE AND DEFENDANT IN ERROR.

Defendant's Objections to Withdrawal of Records.

Now comes the defendant and appellee, The Passumpsic Savings Bank, by Henry C. Ide, its attorney, and objects to the motion of the plaintiffs and appellants for leave to withdraw the transcript of the record, for the reasons:

First. That the records of the Supreme Court ought to remain intact and wholly within the custody of the clerk of the Supreme Court.

Second. Because if another appeal in said cause should be entered in the Supreme Court the existing transcript of record would be essential for the purpose of verifying and testing the accuracy of any new transcript of record that might be filed in said Court.

Third. Because if a new appeal should be taken in said cause, not to the Supreme Court, but to the new court of appeals established by the acts of the last Congress, the records of the Supreme Court ought to be complete and perfect, so that the entire proceedings of that Court and the subject-matter of its action in the premises might at all times be capable of verification and definite ascertainment.

PASSUMPSIC SAVINGS BANK,
By HENRY C. IDE, *Its Solicitor.*

[Endorsed:] Sup. Court U. S. Oct. term, 1890. No. 1354. E. T. Williams, as sheriff, &c., & *al.*, pl'ff in err. & app'ts, *vs.* The Passumpsic Savings Bank. Objections by def't in error & appellee to pl'ff in err. dismissing & withdrawing transcript. Filed Mar. 28, 1891.